Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

HARRY WELTMAN,

Petitioner,

vs.

OZZIE SILNA; DANIEL SILNA; DONALD SCHUPAK; SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.; and PAK FABRICS, INC., d/b/a PAK FABRIC SALE CO.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a District Court may properly hear and decide a case in which the plaintiff claims to be a limited partner of a limited partnership, and one of the defendants is the limited partnership, when the sole basis for federal jurisdiction is diversity of citizenship.

LIST OF PARTIES

The parties to the proceedings below were petitioner Harry Weltman and respondents Ozzie Silna, Daniel Silna, Donald Schupak, Spirits of St. Louis Basketball Club, L.P., and Pak Fabrics, Inc., d/b/a Pak Fabric Sale Co.

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No. _____

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HARRY WELTMAN,

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OZZIE SILNA; DANIEL SILNA; DONALD SCHUPAK; SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.; and PAK FABRICS, INC., d/b/a PAK FABRIC SALE CO.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Harry Weltman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on June 11, 1991.

OPINIONS BELOW

The second opinion of the United State Court of Appeals for the Eighth Circuit ("Eighth Circuit") has been

reported at 936 F.2d 358. It is reprinted in the appendix, at App. 133, infra.

The second memorandum opinion of the District Court for the Eastern District of Missouri is reported at 739 F.Supp. 477. It is reprinted in the appendix, at App. 117, infra.

The order of the Eighth Circuit denying rehearing in banc is reprinted in the appendix, at App. 151, infra.

The first opinion of the Eighth Circuit, holding that federal diversity jurisdiction exists in an action by a limited partner against the limited partnership, is reported at 879 F.2d 425. It is reprinted in the appendix, at App. 107, infra.

The first memorandum opinion of the District Court for the Eastern District of Missouri was not reported. It is reprinted in the appendix, at App. 94, infra.

JURISDICTION

The judgment of the Eighth Circuit, in respondent's favor, was entered June 11, 1991. The Eighth Circuit denied a timely petition for rehearing in banc on August 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

Petitioner filed suit in the Circuit Court for City of St. Louis, Missouri, in which he alleged, inter alia, that he

was a limited partner in respondent Spirits of St. Louis Basketball Club, L.P., a Delaware Limited Partnership ("Spirits"), and was therefore entitled to receive a share in the proceeds of the sale of all or substantially all of the assets of the limited partnership, pursuant to a schedule of distribution set out in the certificate of limited partnership. (App. 1) At the time suit was filed petitioner was a citizen of the State of Ohio; respondents Ozzie Silna and Daniel Silna were citizens of the State of New Jersey; respondent Donald Schupak was a citizen of the State of Nevada; respondent Spirits was a Delaware limited partnership and respondent Pak Fabrics, Inc., was a New Jersey corporation.

Respondents filed a petition for removal to the United States District Court for the Eastern District of Missouri ("District Court"), pursuant to 28 U.S.C. 1441(a), and invoked the District Court's diversity jurisdiction under 28 U.S.C. 1332(a). (App. 23, 26)

Petitioner filed a motion to remand the case back to the Circuit Court for the City of St. Louis, based in part on a lack of complete diversity. (App. 28)

The District Court acknowledged the split which then existed among the various Circuits over the question whether the citizenship of limited partners should be attributed to the limited partnership for purposes of determining diversity jurisdiction. (App. 33-34) The District Court resolved the issue by "aligning the parties according to their real interest in the dispute" and denied petitioner's motion to remand. (App. 35) This had the real effect of failing to attribute petitioner's citizenship to the limited partnership.

Respondents defended on the merits by denying that petitioner was a limited partner, and argued that whatever interest he may have had had been eliminated by an amendment to the original certificate of limited partnership. (App. 44)

Petitioner denied the amendment eliminated his interest, but replied that to the extent the amendment sought to effect his interest it failed, because it did not comply with the requirements of the Delaware Limited Partnership law in effect at the time of the purported amendment, in 1974-75.

The District Court held in its first memorandum opinion that the amendment complied with the Delaware Limited Partnership law *as amended in 1985*, and further found that the amendment operated to remove petitioner as a limited partner. (App. 94, 98)

Petitioner filed a timely Notice of Appeal. (App. 106) Petitioner raised the issue of lack of complete diversity among the parties and argued that his citizenship as a limited partner must be attributed to the defendant limited partnership, and would destroy diversity. The Eighth Circuit refused to attribute petitioner's citizenship to the limited partnership, but reversed the District Court's first judgment upon the ground that the District Court should have applied the Delaware Limited Partnership law in effect at the time of the amendment rather than the amended version in effect at the time of trial. (App. 107) None of the parties filed a petition for a writ of certiorari to the U.S. Supreme Court following the first opinion of the Eighth Circuit.

On remand to the District Court, the parties stipulated that the District Court could rule on the existing record. (App. 115)

In its second memorandum opinion, the District Court found that petitioner had withdrawn from the partnership *prior* to the amendment, and that the amendment therefore complied with even the earlier version of the Delaware Limited Partnership law. (App. 117)

Petitioner filed another timely Notice of Appeal. (App. 132) The Eighth Circuit affirmed the District Court's second judgment, and held that the District Court's finding that petitioner had withdrawn was not "clearly erroneous". (App. 133) The issue of subject matter jurisdiction was not raised by any party, or the court, on the second appeal, although two of the judges who heard the second appeal had also heard the first appeal.

Petitioner filed a petition for rehearing en banc, in which he argued that the panel had incorrectly applied a "clearly erroneous" standard of review to a question of law or a mixed question of law and fact. (App. 141) The petition was denied on August 6, 1991. (App. 151)

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT'S DECISION THAT THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER A CASE IN WHICH THE PLAINTIFF CLAIMED TO BE A LIMITED PARTNER IN A LIMITED PARTNERSHIP WHICH WAS A DEFENDANT, WHEN THE SOLE BASIS FOR FEDERAL JURISDICTION WAS DIVERSITY OF CITIZENSHIP, WAS ERRONEOUS AND IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CARDEN VS. ARKOMA ASSOCIATES, 494 U.S. 185, 110 S.CT. 1015, 108 L.ED.2D 157 (1990), BECAUSE THE CITIZENSHIP OF EACH LIMITED PARTNER MUST BE ATTRIBUTED TO THE LIMITED PARTNERSHIP, AND THE PLAINTIFF LIMITED PARTNER'S CITIZENSHIP WOULD DESTROY DIVERSITY IN ANY ACTION BY THE LIMITED PARTNER AGAINST THE LIMITED PARTNERSHIP

A. THERE CAN BE NO DIVERSITY JURISDICTION IN AN ACTION BY A LIMITED PARTNER AGAINST THE LIMITED PARTNERSHIP

The sole basis for federal jurisdiction was diversity of citizenship of the parties. 28 U.S.C. 1332(a) requires, of course, complete diversity between all plaintiffs and all defendants.

When the District Court denied petitioner's motion to remand, it acknowledged the split among the Circuits over the issue whether the citizenship of a limited partner must be attributed to a limited partnership for purposes of determining diversity jurisdiction. (App. 33-34) The District Court attempted to resolve the issue, however, by "aligning the parties according to their real interest in the dispute". (App. 35) This had the practical effect of *not*

attributing petitioner's Ohio citizenship to the limited partnership.

On the first appeal, the Eighth Circuit agreed with the District Court's analysis, but reversed the case on other grounds. (App. 107) None of the parties elected to seek a writ of certiorari from this Court following the first decision of the Eighth Circuit.

This Court's decision in *Carden vs. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990) was handed down following the first Eighth Circuit decision. (The decision was not brought to the attention of the District Court, and it also apparently escaped the attention of the Eighth Circuit as well. The panel of the Eighth Circuit which heard the second appeal was aware of the fact that subject matter jurisdiction had been an issue, because two of the judges on the second panel had also heard the first appeal.)

In *Carden*, this Court held that diversity jurisdiction in a suit by or against [a limited partnership] depends on the citizenship of all the members of the partnership. 108 L.Ed.2d 157, at 168. This effectively means that federal diversity jurisdiction can never exist in any case brought by a limited partner against the limited partnership, or in any case brought by the limited partnership against one or more of the limited partners.

Carden is in fact being properly used and cited for this proposition, to limit diversity jurisdiction. *Buckley vs. Control Data Corp.*, 923 F.2d 96, 97 (8th Cir., 1991); *Curley vs. Brignoli, Curley & Roberts*, 915 F.2d 81, 83 (2d Cir., 1990); and *Schibuk vs. Poinciana-Regency Limited Partnership*, 764 F.Supp. 868 (S.D.N.Y. 1991).

Petitioner's Ohio citizenship should therefore have been (and now be) attributed to respondent Spirits of St. Louis Basketball Club, L.P., and the case should be remanded to the Eighth Circuit with instructions to remand the case to the Circuit Court for the City of St. Louis.

The fact that petitioner's status as a limited partner was disputed by respondents is of no consequence, because the threshold issue of jurisdiction is determined, under the doctrine of the well-pleaded complaint, on the basis of petitioner's allegations, and not by respondent's answer. *Taylor vs. Anderson*, 34 U.S. 724 (1914). Similarly, the District Court's finding that petitioner had withdrawn from the limited partnership cannot be made the basis for jurisdiction, because the District Court was without jurisdiction to enter such an order in the first place.

B. THE ISSUE OF SUBJECT MATTER JURISDICTION IS AND HAS BEEN TIMELY RAISED

Subject matter jurisdiction would be timely raised before this Court, even if petitioner hadn't raised the issue before the District Court and the Eighth Circuit on the first appeal. The Eighth Circuit's first decision on appeal became the law of the case, and parties should not ordinarily ask an appellate court to reverse itself in the same case.

This Court is free, however, to take a case on certiorari from a second decision by a court of appeals, and review matters determined by the court of appeals in an earlier decision of the court of appeals in the same case.

Indianapolis vs. Chase Nat. Bank, 314 U.S. 63, 75, 62 S.Ct. 15, 86 L.Ed. 47 (1941), reh. den., 314 U.S. 714, 62 S.Ct. 355, 86 L.Ed. 569. In *Indianapolis*, this Court found that a district court had been without jurisdiction even though the Court had denied an earlier petition for writ of certiorari following an earlier decision of the court of appeals in the same case.

This Court has also recently held that a ruling by an earlier panel of a federal court of appeals does not bind this Court as the "law of the case" in this Court's review of a subsequent decision by the court of appeals in the same case. *Lujan vs. National Wildlife Federation*, ___ U.S. ___, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). *See* also, *Christianson vs. Colt Industries Operating Corp.*, ___ U.S. ___, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988).

The issue is therefore timely before the Court.

CONCLUSION

For the foregoing reasons, the decisions of the Eighth Circuit and the District Court should be vacated and set aside, and the cause should be remanded to the Circuit Court for the City of St. Louis.

Respectfully submitted,

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IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

HARRY WELTMANN, Plaintiff, vs. OZZIE SILNA, Serve at: 165 E. Union Ave. East Rutherford, NJ 07073 and DANIEL SILNA, Serve at: 7 Capitol Drive Moonachie, NJ 07074 and DONALD SCHUPAK, Serve at: 919 3rd Avenue New York, NY 10022 and SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P., Serve: Registered Agent United States Corp. Co. 306 S. State St. Dover, Delaware 19901 and PAK FABRICS, INC., d/b/a PAK FABRIC SALE CO., Serve: Registered Agent Ozzie Silna 165 E. Union Ave. East Rutherford, NJ 07073 Defendants.	)	Cause No. 864-00428 Div. 3

PETITION

Comes Now Plaintiff, by and through his attorneys, and as and for his cause of action against Defendants, states and alleges that:

PARTIES

1. Plaintiff Harry Weltman is at all times material herein an individual residing within the State of Ohio.

2. Defendant Ozzie Silna is at all times material herein an individual residing within the State of New Jersey.

3. Defendant Daniel Silna is at all times material herein an individual residing within the State of New Jersey.

4. Defendant Donald Schupak is at all times material herein an individual residing within the State of New York.

5. Defendant Spirits of St. Louis Basketball Club, L.P. (hereinafter sometimes referred to as Defendant "Spirits") is at all times material herein a Delaware Limited Partnership which maintained a principal place of business at 5050 Oakland Avenue within the City of St. Louis, State of Missouri.

6. Defendant Pak Fabrics, Inc., (hereinafter sometimes referred to as Defendant "Pak") is at all times material herein a corporation duly organized and existing by virtue of the laws of the State of New Jersey.

JURISDICTION AND VENUE

7. This Court has jurisdiction of this matter and venue is proper in this Court pursuant to Section 508.500 RSMo. by reason of the fact that the action concerns non-performance of an agreement which was to have been performed in whole or in part in Missouri and upon the further ground that the parties have stipulated to venue in the City of St. Louis. A copy of this stipulation is attached hereto, marked Exhibit "A" and is incorporated herein by this reference as if more fully set out.

FACTS

8. In or around the fall of 1973 Defendant Schupak contacted Plaintiff and requested that Plaintiff make inquiries among his friends and colleagues in professional sports concerning the availability of a professional sports franchise for purchase by Schupak and his clients Defendants Ozzie Silna and Daniel Silna.

9. Thereafter, Plaintiff located and presented various opportunities for consideration by Defendants Schupak, Ozzie Silna and Daniel Silna which finally resulted in the purchase of the Carolina Cougars of the American Basketball Association (hereinafter sometimes referred to as the "Carolina franchise").

10. Before entering into an agreement for the purchase of the Carolina franchise, Defendants Schupak, Ozzie Silna and Daniel Silna requested that Plaintiff agree to manage and operate the franchise on their behalf; as an inducement to Plaintiff to agree to Defendants' request, Defendants Schupak, Ozzie Silna and Daniel Silna offered

Plaintiff a 5 percent (5%) interest in the franchise after these Defendants had recovered their initial investment.

11. Plaintiff accepted Defendants Schupak, Ozzie Silna and Daniel Silna's offer and a limited partnership was formed by Defendant Schupak on behalf of all Defendants and Plaintiff under the laws of the State of Delaware to carry out the purchase of the Carolina franchise and operate the franchise under the name Spirits of St. Louis Basketball Club, L.P.

12. A copy of the limited partnership agreement is attached hereto, marked Exhibit "B" and is incorporated herein by this reference as if more fully set out.

13. The name of the Carolina franchise was changed to Spirit of St. Louis Basketball Club, L.P. and the franchise was moved to St. Louis and maintained a principal place of business at 5050 Oakland Avenue.

14. Plaintiff faithfully carried out his obligations as president or chief operating officer of Defendant Spirits during the 1974-75 and 1975-76 basketball seasons.

15. On or about July 26, 1976, Defendant Spirits entered into an agreement whereby all or substantially all of the assets of Defendant Spirits were sold to the American Basketball Association, the Denver Nuggets, Inc., Arena Sports, Inc., Long Island Sports, a Limited Partnership and San Antonio Basketball, Ltd.

16. A copy of the sale agreement is attached hereto, marked Exhibit "C" and is incorporated herein by this reference as if more fully set out.

17. By the terms of the Limited Partnership Agreement Plaintiff was to receive 5 percent (5%) of the proceeds of the sale of all or substantially all of the assets of the Spirits after Defendants Ozzie Silna and Daniel Silna have recovered their initial investment. Section (I)(3) of the Limited Partnership Agreement provides in pertinent part as follows:

"(3) Distributions of Certain Items.

"(a) . . .

"(b) Sale or Refinance. In the event of the sale of substantially all of its assets, the proceeds shall be applied in the following order or priority:

(i) to the payment of all debts and liabilities of the Partnership, if any, outstanding and then due including debts to Partners, General or limited

(ii) to the setting up of Cash Reserves; provided, however, that at the expiration of such period of time as the General Partner deems advisable the balance of such Reserves shall be distributed in the manner set forth in this paragraph (b):

(iii) The first $1,000,000:

Ozzie Silna	47.5%
Daniel Silna	47.5%
Donald Schupak	5 %

The next $9,000,000:

Ozzie Silna	42.5%
Daniel Silna	42.5%
Harry Weltman	5 %
Donald Schupak	5 %
Eric Rosenfeld	5 %

The remainder:

General Partner	25 %
Ozzie Silna	30 %
Daniel Silna	30 %
Harry Weltman	5 %
Donald Schupak	5 %
Eric Rosenfeld	5 %

18. Defendant Spirits received $2,230,990 plus an interest in television revenues equal in the aggregate to 1/7 of 4/22 of the television revenues thereafter earned by the National Basketball Association.

19. Defendants Pak, Schupak, Ozzie Silna and Daniel Silna have in turn received the sale proceeds from the sale of all or substantially all of the assets of Defendant Spirits.

COUNT ONE

(Breach of Limited Partnership Agreement)

20. Defendants Ozzie Silna and Daniel Silna have recovered their initial investment and Plaintiff is entitled to his share of the sale proceeds resulting from the sale or all or substantially all of the assets of Defendant Spirits pursuant to the Limited Partnership Agreement.

21. Plaintiff has made demand upon Defendants for an accounting and payment of the funds due him, but Defendants have unlawfully failed and refused to pay Plaintiff and thereby breached the Limited Partnership Agreement.

WHEREFORE, Plaintiff prays the Court to make and enter its order directing Defendants to pay over to Plaintiff all funds found to be due Plaintiff pursuant to the Limited Partnership Agreement, with interest; awarding

Plaintiff his costs incurred herein; and for such other and further relief as the Court deems proper.

COUNT TWO

(Action for Accounting)

22. Plaintiff is entitled to an accounting by all Defendants of all proceeds from the sale of all or substantially all of the assets of Defendant Spirits and any and all other revenues received by Defendants from or through Defendant Spirits.

WHEREFORE, Plaintiff prays the Court to make and enter into its order directing Defendants to make a full and complete accounting of all proceeds from the sale of all or substantially all of the assets of Defendant Spirits, along with all other revenues generated or received by or through Defendant Spirits by all Defendants from the date of sale; awarding Plaintiff his costs incurred herein; and for such other and further relief as the Court deems proper.

COUNT THREE

(Imposition of Constructive Trust)

23. Any assets, funds or other things of value received by Defendants as a result of the sale of all or substantially all of the assets of Defendant Spirits should be held in trust by Defendants for the use and benefit of the distrubutees designated in the Limited Partnership Agreement.

WHEREFORE, Plaintiff prays the Court to make and enter its order imposing a constructive trust on any and

all assets, funds or other things of value received by Defendants as a result of the sale of all or substantially all of the assets of Defendant Spirits; for the use and benefit of the distributees, including Plaintiff, in the Limited Partnership Agreement; awarding Plaintiff his costs incurred herein; and for such other and further relief as the Court deems proper.

COUNT FOUR

(Action for Specific Performance)

24. Plaintiff is entitled to specific performance by Defendants of their obligations under the Limited Partnership Agreement.

WHEREFORE, Plaintiff prays the Court to make and enter its order directing Defendants to specifically comply with their contractual obligations under the Limited Partnership Agreement; awarding Plaintiff his costs incurred herein; and for such other and further relief as the Court deems proper.

/s/ James D. Cullen
James D. Cullen, #14026

/s/ Leo V. Garvin, Jr.
Leo V. Garvin, Jr., #20505

/s/ Michael P. Cullen
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EXHIBIT "A"

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September 20, 1985

Sanford P. Dumain, Esq.
Milberg, Weiss, Bershad,
Specthrie & Lerach
One Pennsylvania Plaza
New York, New York 10019

Re: Weltman v. Pak Fabrics, Inc., et al
Our file: 698.002

Dear Sanford:

Enclosed please find the original and one copy of the Stipulation for Dismissal of the above-referenced claim. I would appreciate your signing same and returning the original to my attention for filing with the Court.

This shall further confirm our agreement that this Stipulation for Dismissal without prejudice is based upon your agreement that the defendants in the above-captioned matter will not dispute and hereby consent to personal and subject matter jurisdiction and venue with respect to the refiling of the Complaint in state court in St. Louis, Missouri, with the exception of Ozzie Silna who presently has filed a Petition in Bankruptcy which has stayed litigation pending against him.

If this is in accord with our agreement, kindly acknowledge same by signing and returning to me the copy of this letter enclosed.

Should you have any questions with respect to the foregoing, please do not hesitate to call.

Thank you for your anticipated cooperation in this matter.

Very truly yours,

Timothy P. McCormick

TPM:ns
Encls.

/s/ Sanford P. Dumain
Sanford P. Dumain

Dated: Oct 17, 1985

EXHIBIT "B"

CERTIFICATE OF LIMITED PARTNERSHIP
OF
SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.

This CERTIFICATE OF LIMITED PARTNERSHIP, executed under oath by, Pak Fabrics Inc., a New Jersey Corporation located at 165 East Union Avenue, East Rutherford, New Jersey (hereinafter sometimes referred to as the "General Partner"), and Ozzie Silna, Daniel Silna, Harry Weltman, Donald Schupak and Eric D. Rosenfeld, (hereinafter collectively sometimes referred to as "Limited Partners").

WITNESSETH:

Pursuant to the Delaware Limited Partnership Act, each of the General Partner and the Limited Partners (hereinafter sometimes collectively referred to as the "Partners", and singularly called "Partner"), does hereby execute this Certificate of Limited Partnership and after being duly sworn, does under oath depose and state:

(A) The name of the Partnership is Spirits of St. Louis Basketball Club, L.P., (the "Partnership").

(B) The business of the Partnership shall be to acquire, own and operate a professional basketball team in the American Basketball Association and to transact other business which may be authorized by the Articles of Limited Partnership.

(C) The Partnership's principal place of business shall be located at 5050 Oakland Avenue, St. Louis, Missouri. The registered agent and registered office in State

of Delaware is United States Corporation Company, 306 South State Street, Dover, County of Kent.

(D) The names and places of residence of the Partners are as follows:

General Partner	Address
Pak Fabrics Inc.	165 East Union Avenue East Rutherford, NJ
Limited Partners	**Address**
Donald Schupak	299 Garfield Place Brooklyn, NY 11215
Eric Rosenfeld	50 East 72 Street, Apt. 3A New York, NY
Harry Weltman	25 Carrswold Clayton, MO 63105
Ozzie Silna	603 Wilmerding Avenue Teaneck, NJ
Daniel Silna	15 Emery Lane Woodcliff Lake, NJ 07675

(E) The term for which the Partnership is to exist, commences as of the filing of this Certificate and continues until the occurrence of any of the following events:

(1) Fifty (50) years from the date of this Certificate;

(2) The sale or distribution of all or substantially all, or the abandonment of the business, assets and properties of the Partnership, unless at least 70% of the Limited Partners consent to continue the Partnership;

(3) The acquisition by the General Partner of the interest of all Limited Partners;

(4) The bankruptcy of the General Partner unless there remains at least one General Partner who is not bankrupt, or the Limited Partners, by majority vote, elect a new General Partner or Partners to continue the business of the Partnership;

(5) Sixty (60) days after the execution of a written consent to termination by the General Partner and at least 70% in interest of Limited Partners of the Partnership; providing, however, that copies of such consent shall be properly mailed to the General Partner and the other Limited Partners;

(6) The dissolution, retirement, death, bankruptcy, or insanity of a General Partner or any assignment by a General Partner, for the benefit of creditors or the occurrence of any act or omission by a General Partner which results in the dissolution of the Partnership by law, or under any provision hereof; providing however, in the event there is more than one General Partner, the remaining General Partner shall have the right, at his or its election, to continue the Partnership and to succeed as sole General Partner to all rights of management held theretofore, by either or both General Partner, and in which event the Partnership shall not be dissolved by reason of the events prescribed in this subsection 6.

(F) (1) The contributions of the respective Limited Partners are cash in the following amounts:

Eric Rosenfeld	$ 500
Donald Schupak	$ 500
Harry Weltman	$ 500
Ozzie Silna	$10,000
Daniel Silna	$10,000

(2) The contribution of the General Partner shall be $500,000.

(G) In the event the General Partner determines that the Partnership requires additional capital to support its operations, it may require Ozzie Silna and Daniel Silna to each contribute to the capital of the Partnership $250,000. This obligation shall expire May 31, 1976.

(H) The time when the contributions of the Limited Partners shall be returned is upon distribution of those assets remaining after payment of all liabilities of the Partnership upon termination and dissolution of the Partnership, to the extent such assets may equal the unreturned portion of the amounts of the Limited Partners' initial and any additional cash contributions undiminished by any losses.

(I) The respective shares of the profits or other compensation by way of income and loss which the General Partner and Limited Partners shall receive by reason of other contributions are as follows:

(1) Allocation of Current Items. Except as otherwise provided for herein, for federal and state income tax purposes, the current items of profit and loss of the Partnership shall be allocated as follows:

	Profit	Loss
General Partner	5 %	5 %
Ozzie Silna	44.5%	45.5%
Daniel Silna	44.5%	45.5%
Donald Schupak	4 %	4 %
Harry Weltman	1 %	0 %
Eric Rosenfeld	1 %	1 %

(2) Special Allocations. Notwithstanding anything in this Paragraph (1) to the contrary any gain realized by the Partnership as a result of the foregiveness of indebtedness shall be allocated solely to the General Partner.

(3) Distributions of Certain Items.

(a) The first $250,000 excess cash flow from normal operations, when and if available, will be distributed on a noncumulative basis prorata to Donald Schupak, Ozzie Silna and Daniel Silna-12-1/2% to Donald Schupak and 43.75% to each Ozzie and Daniel Silna. The remainder shall be distributed as follows:

General Partner	5%
Ozzie Silna	45%
Daniel Silna	45%
Donald Schupak	5%

(b) Sale or Refinance. In the event of the sale of substantially all of its assets, the proceeds shall be applied in the following order or priority:

(i) to the payment of all debts and liabilities of the Partnership, if any, outstanding and then due including debts to Partners, General or Limited

(ii) to the setting up of Cash Reserves; provided, however, that at the expiration of such period of time as the General Partner deems advisable the balance of such Reserves shall be distributed in the manner set forth in this paragraph (b):

(iii) The first $1,000,000:

Ozzie Silna	47.5%
Daniel Silna	47.5%
Donald Schupak	5 %

The next $9,000,000:

Ozzie Silna	42.5%
Daniel Silna	42.5%
Harry Weltman	5 %
Donald Schupak	5 %
Eric Rosenfeld	5 %

The remainder:

General Partner	25%
Ozzie Silna	30%
Daniel Silna	30%
Harry Weltman	5%
Donald Schupak	5%
Eric Rosenfeld	5%

(iv) Anything contained herein to the contrary notwithstanding, in the event that any distributions made pursuant to this paragraph (c) are less than the profits allocated to the Limited Partner for federal and state income tax purposes, then the General Partner's share of such distribution shall be decreased and the Limited Partners' share increased until such time as the amount of distributions to the Limited Partners equal the profits allocated to them pursuant to subparagraph (1) of Paragraph (I) for the taxable year.

(J) A Limited Partner may not substitute an assignee as contributor in his place.

(K) The right of the Partners to admit additional limited partners is confined to those persons who may become assignees or successors-in-interest of a Limited Partner or those persons who have obtained the prior written consent of the General Partner.

(L) Except as otherwise provided herein, no priority as to contributions or as to compensation is given to any Limited Partner over another Limited Partner.

(M) The right is given to the remaining General Partner, at the election of such remaining General Partner, to continue the business in the event of dissolution, retirement, death, bankruptcy, or insanity of the other General Partner or in the event of any assignment by the other General Partner for the benefit of creditors or in the event of the occurrence of any act or omission by the other General Partner which results in the dissolution of the Partnership by law or under the Articles of Limited Partnership.

(N) No right is given a Limited Partner to demand and receive peoperty [sic] other than cash in return for its contribution; provided, however, so far as practical distributions upon dissolution shall be made by transferring to the Partners (or their legal representatives, heirs, successors or assigns) undivided interests in the assets of the Partnership according to the fair market value of such assets at the time of distribution.

WITNESS the execution hereof as the 14 day of October, 1974.

SPIRITS OF ST. LOUIS
BASKETBALL CLUB, L.P.

By: /s/ Donald Schupak Pres.
Pak Fabrics Inc.,
General Partner
Donald Schupak,
President

[SEAL]

WITNESS:

/s/ Susan L. Feltzin

_____ /s/ Donald Schupak
DONALD SCHUPAK

WITNESS:

/s/ Susan L. Feltzin

_____ /s/ Eric D. Rosenfeld
ERIC D. ROSENFLED

WITNESS:

/s/ Susan L. Feltzin

_____ /s/ Ozzie Silna
OZZIE SILNA

WITNESS:

/s/ Susan L. Feltzin

_____ /s/ Daniel Silna
DANIEL SILNA

WITNESS:

/s/ Susan L. Feltzin

_____ /s/ Harry Weltman
HARRY WELTMAN

WITNESS:

/s/ Susan L. Feltzin

_____

STATE OF NEW YORK)
: s.s.:
COUNTY OF NEW YORK)

DONALD SCHUPAK, being duly sworn, states that he is the President of Pak Fabrics, Inc. the General Partner named in the foregoing certificate, and that the facts set forth therin [sic] are true and correct, and that he was authorized by the Board of Directors of Pak Fabrics, Inc. to execute this certificate on its behalf.

/s/ Donald Schupak
DONALD SCHUPAK, President
Pak Fabrics, Inc.

[SEAL]

SUBSCRIBED AND SWORN
TO before me this 14th day
of October, 1974.

/s/ Susan L. Feltzin
NOTARY PUBLIC in
and for New York
County.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

DONALD SCHUPAK, being duly sworn, states that he is a Limited Partner named in the foregoing certificate, and that the facts set forth therein are true and correct.

/s/ Donald Schupak
DONALD SCHUPAK

SUBSCRIBED AND SWORN
TO before me this 14th day
of October, 1974.

/s/ Susan L. Feltzin
NOTARY PUBLIC in
and for New York
County.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

ERIC D. ROSENFELD, being duly sworn, states that he is a Limited Partner named in the foregoing certificate, and that the facts set forth therein are true and correct.

/s/ Eric D. Rosenfeld
ERIC D. ROSENFELD

SUBSCRIBED AND SWORN
TO before me this 14th day
of October, 1974.

/s/ Susan L. Feltzin
NOTARY PUBLIC in
and for New York
County.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

HARRY WELTMAN, being duly sworn, stated that he is a Limited Partner named in the foregoing certificate, and that the facts set forth therein are true and correct.

/s/ Harry Weltman
HARRY WELTMAN

SUBSCRIBED AND SWORN
TO before me this 14th day
of October, 1974.

/s/ Susan L. Feltzin
NOTARY PUBLIC in
and for New York
County.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

OZZIE SILNA, being duly sworn, states that he is a Limited Partner named in the foregoing certificate, and that the facts set forth therein are true and correct.

/s/ Ozzie Silna
OZZIE SILNA

SUBSCRIBED AND SWORN
TO before me this 14th day
of October, 1974.

/s/ Susan L. Feltzin
NOTARY PUBLIC in
and for New York
County.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

DANIEL SILNA, being duly sworn, states that he is a Limited Partner named in the foregoing certificate, and that the facts set forth therein are true and correct.

/s/ Daniel Silna
DANIEL SILNA

SUBSCRIBED AND SWORN
TO before me this 14th day
of October, 1974.

/s/ Susan L. Feltzin
NOTARY PUBLIC in
and for New York
County.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMANN, Plaintiff, vs. OZZIE SILNA, DANIEL SILNA, DONALD SCHUPAK, SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P., and PAK FABRICS, INC., d/b/a PAK FABRIC SALE CO., Defendants.	)	Case No. ___

VERIFIED PETITION FOR REMOVAL

COME NOW defendants and for their Verified Petition for Removal state:

1. On October 20, 1986, plaintiff commenced this civil action against defendants in the Circuit Court for the City of St. Louis, Missouri, which case bears No. 864-00428.

2. On December 23, 1986, process was served upon a former agent of defendant Spirits of St. Louis Basketball Club, L.P. ("Spirits").

3. On December 29, 1986, process was served upon defendant Schupak.

4. On December 31, 1986, defendant Ozzie Silna and Pak Fabrics, Inc. consented to the undersigned law firm's accepting service and entering an appearance on their behalf.

5. On January 5, 1987, defendant Daniel Silna authorized the undersigned law firm to accept service and enter an appearance on his behalf.

6. A copy of the petition filed in this action, together with a copy of the summonses directed to defendants Schupak and Spirits, are attached hereto as Exhibit 1 and incorporated by reference herein. No further proceedings have occurred in the state court and there are no other pleadings, process or orders in this action, other than that referenced above and attached as an exhibit hereto.

7. The plaintiff at the time this action was commenced was and still is a citizen of the State of Ohio. Defendant Ozzie Silna at the time this action was commenced was a citizen of the State of New Jersey, and is now a citizen of the State of California. Defendant Daniel Silna at the time this action was commenced was and still is a citizen of the State of New Jersey. Defendant Donald Schupak at the time this action was commenced was and still is a citizen of the State of Nevada. Defendant Pak Fabrics, Inc. at the time this lawsuit was commenced was and still is a citizen of the State of New Jersey, the state of its incorporation. Defendant Spirits at the time this action was commenced was and still is a citizen of the State of New Jersey, by virtue of the citizenship of Pak Fabrics, Inc., its sole general partner.

8. The amount in controversy in this action exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

10. The district courts of the United States have original jurisdiction over this action pursuant to 28 U.S.C. §1332.

11. This action is removable pursuant to 28 U.S.C. §1441, and this Verified Petition for Removal is timely filed under 28 U.S.C. §1446.

12. Defendants file herewith a bond of good and sufficient surety conditioned, as provided by 28 U.S.C. §1446, that they will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this action is not removable or was improperly removed.

WHEREFORE, defendants pray that the action now pending against them in the Circuit Court of the City of St. Louis, State of Missouri be removed therefrom to this Court.

Respectfully submitted,

GALLOP, JOHNSON & NEUMAN

By: /s/ David W. Harlan
David W. Harlan
Thomas M. Newmark
101 South Hanley, Suite 1600
St. Louis, Missouri 63105
(314) 862-1200

Attorneys for All Defendants

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMANN, Plaintiff, vs. OZZIE SILNA, DANIEL SILNA, DONALD SCHUPAK, SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P., and PAK FABRICS, INC., d/b/a PAK FABRIC SALE CO., Defendants.	)	No. 87-0091-C-A

AMENDMENT BY INTERLINEATION
TO VERIFIED PETITION FOR REMOVAL

COME NOW defendants and for their Amendment by Interlineation to their Verified Petition for Removal add the following averments to paragraph 7 [interlineated portions underscored]:

> 7. The plaintiff at the time this action was commenced was and still is a citizen of the State of Ohio. Defendant Ozzie Silna at the time this action was commenced was a citizen of the State of New Jersey, and is now a citizen of the State of California. Defendant Daniel Silna at the time this action was commenced was and still is a citizen of the State of New Jersey. Defendant Donald Schupak at the time this action was commenced was and still is a citizen of the State of Nevada. Defendant Pak Fabrics, Inc. at the time this lawsuit was commenced was and still is a citizen of the State of New Jersey, the state

of its incorporation. *Pak Fabrics, Inc. is an inactive corporation with no principal place of business. However, to the extent it can be deemed to have a principal place of business, it would be in New Jersey, the state where it maintains its registered office. It is thus, for citizenship purposes, arguably also a citizen of the State of New Jersey.* Defendant Spirits at the time this action was commenced was and still is a citizen of the State of New Jersey, by virtue of the citizenship of Pak Fabrics, Inc., its sole general partner. *Moreover, to the extent that citizenship of a limited partnership is determined also by the citizenship of its limited partners, the present remaining limited partners are Dan and Ozzie Silna, whose citizenship is specified above; neither of Spirits' present limited partners is a citizen of either the State of Missouri or Ohio. There is thus complete diversity between plaintiff and all defendants.*

GALLOP, JOHNSON & NEUMAN

/s/ David W. Harlan
David W. Harlan
Philip E. Morgan, Jr.
Thomas M. Newmark
101 South Hanley, Suite 1600
St. Louis, MO 63105
314-862-1200

Attorneys for All Defendants

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMANN, Plaintiff,	)	
vs.	)	Cause No. 87-0091-C-A
OZZIE SILNA, et al., Defendants.	)	

MOTION TO REMAND

Comes now Plaintiff, by and through his attorneys, and moves the court to make and enter its order remanding plaintiff's cause of action to the Circuit Court of the City of St. Louis upon the following grounds:

(1) the parties have previously stipulated to submit to jurisdiction and venue in the Circuit Court of the City of St. Louis. A copy of the stipulation is attached hereto, marked Exhibit "A" and is incorporated herein by this reference as if more fully set out.

(2) the matter could not have originally been brought in this court; and

(3) complete diversity does not exist between all the parties.

WHEREFORE, Plaintiff prays the court to remand this proceeding to the Circuit Court of the City of St. Louis at defendants' costs, and for such other and further orders as the Court deems proper.

Michael P. Cullen, #31814

8631 Delmar, Suite 300
St. Louis, MO 63124
(314) 993-1400
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Remand was served upon defendants by mail to:

David W. Harlan
Thomas M. Newmark
101 S. Hanley Road, Suite 1600
St. Louis, MO 63105

by U.S. Mail, postage prepaid, this ___ day of April, 1987.

EXHIBIT "A"

HERMANN, CAHN & SCHNIEDER

Attorneys at Law

1070 Huntington Building

Cleveland, Ohio 44115-1432

(216) 761-5515

September 20, 1985

Sanford P. Dumain, Esq.
Milberg, Weiss, Bershad, Specthrie & Lerach
One Pennsylvania Plaza
New York, New York 10019

Re: Weltman v. Pak Fabrics, Inc., et al
Our File: 698.002

Dear Sanford:

Enclosed please find the original and one copy of the Stipulation for Dismissal of the above-referenced claim. I would appreciate your signing same and returning the original to my attention for filing with the Court.

This shall further confirm our agreement that this Stipulation for Dismissal without prejudice is based upon your agreement that the defendants in the above-captioned matter will not dispute and hereby consent to personal and subject matter jurisdiction and venue with respect to the refiling of the Complaint in state court in St. Louis, Missouri, with the exception of Ozzie Silna who presently has filed a Petition in Bankruptcy which has stayed litigation pending against him.

If this is in accord with our agreement, kindly acknowledge same by signing and returning to me the copy of this letter enclosed.

Should you have any questions with respect to the foregoing, please do not hesitate to call.

Thank you for your anticipated cooperation in this matter.

Very truly yours,

Timothy P. McCormick

TPM:ns
Encls.
/s/ Sanford P. Dumain Dated: Oct. 17, 1985
Sanford P. Dumain

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN, Plaintiff,	)	No. 87- 91C (A___
vs.	)	
OZZIE SILNA, et al., Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on plaintiff's motion to remand. Plaintiff brought a cause of action in the Circuit Court of the City of St. Louis against defendants. Defendants joined in filing a verified petition for removal which stated that plaintiff was a citizen of Ohio and that the individual defendants were citizens of New Jersey, Californi [sic] and Nevada, that the corporation defendant was a citizen of New Jersey, and that defendant, Spirits of St. Louis Basketball Club (Spirits), a limited partnership, was a citizen of New Jersey through the citizenship of its general partner. Additionally, the limited partners of Spirits are alleged to include citizens of California, New Jersey and, through plaintiff, Ohio.

Plaintiff's motion to remand presents three reasons why this Court lacks jurisdiction. First, he asserts that removal was improper because the cause of action could not have been brought originally in this Court. Secondly, he says that removal by the defendants violated an agreement by the parties. Finally, he contends that there is a lack of complete diversity between the parties.

Plaintiff, in his first point, notes that removal is only possible if the cause of action taken from the state court could have been originally brought in federal court. 28 USC 1441(a). He then argues that because of the federal vanue [sic] statute, 28 USC 1391(a), this action could not have been brought in the United States District Court for the Eastern District of Missouri. Therefore, he argues, removal to this Court is illegal.

Plaintiff's reading of the federal venue statute is questionable. But it is unnecessary to decide whether venue in this Court would be improper under 28 USC 1391(a). 28 USC 1441(a) does not require that the plaintiff be able to bring his cause of action in a particular federal court. Rather, it merely requires that "the district courts of the United States have original jurisdiction." Id. If there is jurisdiction, the statute provides for venue in "the district court of the United States for the district and division embracing the place where such action is pending." Id. The venue provisions of 28 USC 1391 do not prevent removal under 28 USC 1441(a). *Polizzi v. Cowles Magazines, Inc.*, 345 U. S. 663, 665 (1953). Here, because the action was pending in the Circuit Court of the City of St. Louis, removal is proper. The fact that the plaintiff might not have been able to try his action in this particular forum, had he filed his petition here, does not mean that "the district courts of the United States" did not have original jurisdiction as required.

Plaintiff's second point is also meritless. He argues that an agreement by the parties to dismiss a prior action on this subject in the United States District Court for the

District of New Jersey prevents removal. In the agreement, the parties consented "to personal and subject matter jurisdiction and vanue [sic] with respect to the refiling of the complaint in state court in St. Louis, Missouri." According to plaintiff, these words constitute an agreement to the venue of the accrued cause of action which this Court should honor. Merely because defendants consented to jurisdiction and venue in state court does not mean that they also waived any right to removal. The agreement, which was drafted by plaintiff, does not provide for any exclusive jurisdiction in the state court, but, instead, only addresses defendants' consent to jurisdiction and venue to refiling in state court. Had the parties intended to preclude removal, such should have been included in the agreement.

Plaintiff's final point is that there is not complete diversity in this case. Plaintiff's theory is that he, an Ohio citizen, sued numerous defendants, all but one with which there was diversity. However, defendant Spirits, a limited partnership, allegedly includes plaintiff as one of its limited partners. If the citizenship of a limited partnership is the citizenship of each of its partners, both limited and general, Spirits is an Ohio citizen and diversity is destroyed.

Plaintiff and defendants acknowledge that there is a split in the circuits on the effect of a limited partner's citizenship. Three circuits require that the citizenship of each limited partner be considered when deciding the citizenship of the partnership and, thus, determining whether there is diversity. *Carlsberg Resources Corp. v. Cambria Savings and Loan Association*, 554 F. 2d 1254,

1260-1262 (3rd Cir. 1977); *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015, 1019 (4th Cir. 1985); *Elston Investment, Ltd. v. David Altman Leasing Corp.*, 731 F. 2d 436, 438 (7th Cir. 1984). Two circuits ignore the citizenship of the limited partners when determining the citizenship of the partnership. *Colonial Realty Corp. v. Bache & Co.*, 358 F. 2d 178, 184 (2nd Cir. 1966); *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.*, 797 F. 2d 238, 242-243 (5th Cir. 1986).

If this Court were to follow the Second and Fifth Circuits the discussion would end here, since Spirits would be deemed only a New Jersey citizen by virtue of the citizenship of its general partner. But if this Court were to follow the Third, Fourth and Seventh Circuits, it would be necessary to address one additional issue, the proper alignment of the parties. The re-alignment of the parties to reflect their true interest could prevent this Court from remanding even if it adopted the view that the citizenship of a limited partner must be considered in determining the partnership's citizenship.

A federal district court, when deciding whether there is complete diversity of citizenship, does not unquestionably accept the parties' designation of who is plaintiff and who is defendant. Rather, it looks "beyond the pleadings and arrange[s] the parties according to their sides in the dispute." *City of Indianapolis v. Chase Manhattan Bank*, 314 U. S. 63, 69 (1941). Here, Spirits is, arguably, an Ohio citizen because of plaintiff. But courts are not reluctant to examine the partnership and make a practical determination based on the nature of the dispute. In *Bundag, A. G. v. Euramerica Corp.*, 510 F. Supp. 622 (N.D. Tex. 1981), the court found that diversity existed despite the fact that the

limited partnership and the general partner were on opposite sides of the lawsuit. The court noted that the real parties to the action were the limited partners versus the general partner. *Id.* at 623-624. In another case, a Texan limited partner sued the limited partnership and the Georgian general partner (who was the only other partner). The plaintiff, as in the case here, said that there was not complete diversity since the partnership was both a Texas and Georgia citizen. The court rejected that contention, noting that plaintiff could not "assert her own Texas citizenship * * * [to align] herself as a defendant [thereby] destroying diversity." *Gore v. Stenson*, 616 F. Supp. 895, 900 (S.D. Tex. 1984).

After aligning the parties according to their real interest in the dispute, it becomes obvious that no defendant is from Ohio. Therefore, there is complete diversity of citizenship. As a result, there is no need to address the issue of whether a limited partner's citizenship is to be used in ascertaining the citizenship of the limited partnership.

Accordingly, as above stated, plaintiff's motion to remand is denied.

/s/ Roy W. Harper
U. S. District Judge

July 15, 1987.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMANN, Plaintiff, vs. OZZIE SILNA, *et al.*, Defendants.	)	Case 87-0091-C-A

FIRST AMENDED ANSWER OF ALL DEFENDANTS

COME NOW all defendants and for their Answer to plaintiff's Complaint state:

FIRST DEFENSE

Responding to each numbered paragraph of plaintiff's Complaint, defendants state:

1. Admitted.

2. Defendant Ozzie Silna was at the time this lawsuit was commenced a citizen of the State of New Jersey, and is now a citizen of the State of California. Except as expressly so admitted, the other averments in this paragraph are denied.

3. Defendant Daniel Silna was at the time this lawsuit was commenced and still is a citizen of the State of New Jersey. Except as expressly so admitted, the other averments of this paragraph are denied.

4. Defendant Donald Schupak was at the time this lawsuit was commenced and still is a citizen of the State

of Nevada. Except as expressly so stated, the other averments of this paragraph are denied.

5. Defendant Spirit of St. Louis Basketball Club, L.P. ("Spirits") is a Delaware limited partnership. Except as expressly so admitted, the other averments of this paragraph are denied.

6. Defendant Pak Fabrics, Inc. was at the time this lawsuit was commenced and still is a citizen of the State of New Jersey, the state of its incorporation. Pak Fabrics, Inc. is an inactive corporation with no principal place of business. It did at the time this lawsuit was commenced and still does, however, maintain a registered office in the State of New Jersey, which registered office could be deemed to be its principal place of business. The corporation thus could also be deemed to be a New Jersey citizen by virtue of the location of its registered office. Except as expressly so admitted, all other averments of this paragraph are denied.

7. Defendants admit that jurisdiction over this matter and venue were properly with the Circuit Court for the City of St. Louis, State of Missouri. and further state that this matter was properly removed to this Court. Except as expressly so admitted, all other averments of this paragraph are denied.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Defendants admit that Exhibit B to plaintiff's Complaint is a copy of a limited partnership agreement that has been superseded by an amended limited partnership agreement and. accordingly, is no longer of any force or effect. Except as expressly so admitted, all other averments of this paragraph are denied.

13. Denied.

14. Denied. Plaintiff materially failed to perform his obligations owed to defendants. His analysis of the feasibility of operating an ABA franchise in St. Louis was negligent, amateurish and defective, and he negligently misrepresented the St. Louis market potential to defendants. Plaintiff's revenue projections for the Spirits were grossly inflated, his expense projections were grossly underestimated, he failed to run the Spirits anywhere near a prudent budget, he failed to assemble adequate office staff, he failed to mount an adequate marketing or advertising program, he did not develop adequate relations with the St. Louis community, and he did not put together a satisfactory "on court" basketball program. The Spirits' failure in St. Louis is thus largely attributable to Weltman's negligent, incompetent, inadequate and wholly unsatisfactory job performance.

15. Denied.

16. Denied; plaintiff's Exhibit C speaks for itself. Moreover, plaintiff had absolutely nothing to do with the Spirits' litigation against the NBA and other ABA teams, and the results of that litigation are in no way attributable to plaintiff.

17. Denied. In fact, Weltman had absolutely no interest in the limited partnership, as the Amended Limited Partnership Agreement on file with the Secretary of State in Delaware plainly reflects.

18. Denied.

19. Denied.

COUNT I

20. Denied.

21. Denied.

COUNT II

22. Denied.

COUNT III

23. Denied.

COUNT IV

24. Denied.

SECOND DEFENSE

Plaintiff's claims are barred by laches and the applicable statutes of limitation.

THIRD DEFENSE

To the extent that defendants were in any way obligated to plaintiff, plaintiff has failed to perform the requisite conditions precedent to any such obligations, as follows:

1. He represented himself to be an expert in professional sports analysis and management; he had no such expertise.

2. He grossly misanalyzed St. Louis' feasibility as a site for an ABA franchise.

3. He grossly underestimated the franchise's expenses and grossly overestimated its potential revenues.

4. He ran an inefficient and amateurish operation, both at the box office and on the court.

5. His failings directly cost the Spirits, and its investors, millions of dollars.

FOURTH DEFENSE

As set forth above, plaintiff's negligence, gross failure of performance, and incompetence cost the Spirits, its investors, and its creditors millions of dollars. Defendants were thus directly and substantially damaged as a consequence of plaintiff's negligence and incompetence. Any moneys owed to plaintiff must, therefore, be set off against the damages he has caused each defendant to suffer.

FIFTH DEFENSE

Any agreement between plaintiff and defendants has failed by want of consideration due to plaintiff's gross failure of performance.

SIXTH DEFENSE

Plaintiff is estopped from obtaining the equitable relief he seeks by virtue of his unclean hands in that, *inter alia*:

1. He misrepresented to defendants his abilities and expertise;

2. He misrepresented to defendants the feasibility of operating an ABA franchise in St. Louis; and

3. He encouraged and induced defendants to make an imprudent investment, as a result of which investment he personally profited.

SEVENTH DEFENSE

Plaintiff is estopped from seeking the legal and equitable relief he seeks for the reason that such relief is antagonistic to the rights and interests of the limited partners to whom he owed and owes a fiduciary duty.

EIGHTH DEFENSE

Plaintiff signed the Amended Limited Partnership Agreement as president of the corporate general partner. By so signing, he represented to all limited partners that they were the only persons with limited partnership

interests, and they invested on that basis. Plaintiff was a fiduciary to the limited partners, he acted on their behalf, he signed the Amended Limited Partnership Agreement as their attorney-in-fact, he induced them to act and to invest in the limited partnership, and he is thus now estopped from asserting any claim or interest contrary to that evident in the Amended Limited Partnership Agreement.

NINTH DEFENSE

Plaintiff, by his conduct and by signing the Amended Limited Partnership Agreement, withdrew, resigned, transferred, or otherwise terminated his interest in the limited partnership, and thus has no rights to or interest in the Limited Partnership and any profits, assets, proceeds, or revenues thereof.

TENTH DEFENSE

With respect to defendant Ozzie Silna, any obligation owed by him to plaintiff has been discharged in bankruptcy.

WHEREFORE, having fully answered, defendants pray that plaintiff's Complaint. and all counts thereof, be dismissed, for their attorneys' fees and other costs of suit,

and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

Gallop, Johnson & Neuman

/s/ Thomas M. Newmark
David W. Harlan
Thomas M. Newmark
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 1987, I have deposited in the United States mail, postage prepaid, properly addressed to Leo V. Garvin, Jr. and Michael Cullen, Attorney for Plaintiff, 7800 Forsyth Boulevard, 6th Floor, St. Louis, Mo. 63105 a copy of the foregoing Answer Of All Defendants.

/s/ Thomas M. Newmark

AMENDMENT NO. 1 OF THE
AGREEMENT AND CERTIFICATE OF
LIMITED PARTNERSHIP OF
SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.

THIS AGREEMENT for the amendment in entirety of the Agreement and Certificate of Limited Partnership of Spirits of St. Louis Basketball Club, L.P., a limited partnership formed under the laws of the State of Delaware made as of the 31st day of December 1974, by and among Pak Fabrics, Inc., as General Partner, and the persons listed on Schedules I and II annexed hereto as Limited Partners;

WHEREAS, the parties hereto executed and filed an Agreement and Certificate of Limited Partnership on the 16th day of October 1974 with the Secretary of State of the State of Delaware; and

WHEREAS, the parties hereto are desirous of amending and restating such Agreement and Certificate of Limited Partnership in entirety.

NOW, THEREFORE, the parties hereto hereby amend and restate in its entirety said Agreement and Certificate of Limited Partnership of the Spirits of St. Louis Basketball Club, L.P. to read as follows:

"AGREEMENT AND CERTIFICATE
OF LIMITED PARTNERSHIP
OF
SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.

"This Agreement and Certificate of Limited Partnership, executed as of the 31st day of December 1974, by and among the General Partner, Pak Fabrics, Inc. ("Pak",

or "General Partner") and the persons (with their addresses) listed on Schedule I attached hereto, being the Class I Limited Partners, as well as all of the persons (with their addresses) listed on Schedule II attached hereto, being the Class II Limited Partners in accordance with the provisions hereof and the applicable provisions of Delaware law (the Class I and Class II Limited Partners are hereinafter referred to collectively as the "Limited Partners").

"WITNESSETH:

"ARTICLE I

"The Partnership

"SECTION 1.01 Admittance of Class I Limited Partners. The General Partner and the Class II Limited Partners hereby agree and do hereby admit the Class I Limited Partners as Partners in their Partnership and hereby agree to the Qualification of the Partnership as a Limited Partnership pursuant to the applicable laws of the State of Delaware.

"SECTION 1.02 Name, Business and Principal Office.

(a) The name of the Partnership is Spirits of St. Louis Basketball Club, L.P. (the "Partnership").

(b) The business of the Partnership shall be to acquire, own and operate a professional basketball team in the American Basketball Association and to transact other business which may be authorized by the Articles of Limited Partnership.

(c) The Partnership's principal place of business shall be located at 5050 Oakland Avenue, St. Louis, Missouri. The registered agent and registered office in the State of Delaware is the United States Corporation Company, 306 South State Street, Dover, County of Kent.

"SECTION 1.03 Effective Date. The term for which the Partnership is to exist commences as of the filing of this Certificate and continues until the occurrence of any of the following events:

(a) Fifty (50) years from the date of this Certificate;

(b) The sale of distribution of all or substantially all, or the abandonment of the business, assets and properties of the Partnership, unless at least 70% of the Limited Partners consent to continue the Partnership;

(c) The acquisition by the General Partner of the interest of all Limited Partners;

(d) The bankruptcy of the General Partner unless there remains at least one General Partner who is not bankrupt, or the Limited Partners, by majority vote, elect a new General Partner of Partners to continue the business of the Partnership;

(e) Sixty (60) days after the execution of a written consent to termination by the General Partner and at least 70% in interest of Limited Partners of the Partnership; provided, however, that copies of such consent shall be properly mailed to the General Partner and the other Limited Partners;

(f) The dissolution, retirement, death, bankruptcy, or insanity of a General Partner or any assignment by a

General Partner, for the benefit of creditors or the occurrence of any act or omission by a General Partner which results in the dissolution of the Partnership by law, or under any provision hereof; provided, however, in the event there is more than one General Partner, the remaining General Partner shall have the right, at his or its election, to continue the Partnership and to succeed as sole General Partner to all rights of management held theretofore, by either or both General Partner and in which event the Partnership shall not be dissolved by reason of the events prescribed in this subsection (f).

"SECTION 1.04 Definitions. Within the context of this Agreement, the following terms shall have the following meanings:

(a) "Capital Account" with respect to each Partner shall mean the total capital contribution of the Partner made from time to time to the Partnership, plus or minus, as the case may be, the total of the Partner's respective share of net profits and losses allocated to the Partner minus any amounts distributed to the Partner. "Adjusted Capital Account" shall refer to the Capital Account adjusted to reflect allocations of non-recourse indebtedness.

(b) "Cash Flow" with respect to any period shall mean the net proceeds to the Partnership from all cash receipts (if any) derived during said period as a result of conducting the Partnership's ordinary business exclusive of any profits from the sale of Partnership assets or any part thereof, financings or other extraordinary transactions not in the ordinary course of business less (a) Operating Expenses during said period and (b) Cash Reserves

set aside during said period which are deemed reasonably necessary for the proper operation of the Partnership's business.

(c) "Capital Items – Proceeds" with respect to any period shall mean the net proceeds to the Partnership from all of the Partnership's share of all cash receipts (if any) derived during said period not in the ordinary course of business and shall include, without limitation, the cash proceeds received from any sale, exchange or other disposition of the Partnership's assets or any part thereof, condemnation awards, refinancings, proceeds received by the Partnership from any insurance carrier as a result of any fire and/or casualty, and any other realizations made by the Partnership in connection with a capital transaction or a transaction not in the course of its ordinary business.

(d) "Cash Reserves" shall unless otherwise provided herein mean the amount deemed reasonably necessary by the General Partner to provide the required funds for the proper operation of the Partnership's business including, without limitation, provision for state and local taxes, insurance, and amortization of loans.

(e) "Current Item – Receipts" shall mean all cash receipts by the Partnership in the ordinary course of business but shall exclude all cash receipts derived from Capital Items.

(f) "General Partner" shall mean Pak only, unless substituted, replaced or an additional General Partner is admitted as herein provided.

(g) "Interest," "Unit," or "Limited Partnership Unit" shall be used interchangeably in this Agreement and shall mean the ownership interest of a Limited Partner in the Partnership at any particular time, including the rights of such Limited Partner to any and all benefits to which such Limited Partner may be entitled as provided in this Agreement and in the Uniform Limited Partnership Act of the State of Delaware together with the obligations of such Limited Partner to comply with all of the terms and provisions of this Agreement.

(h) "Limited Partners" shall mean the Class I Limited Partners listed on Schedule I, the Class II Limited Partners listed on Schedule II, and any additional or substituted Limited Partners. A Limited Partner shall continue to be deemed the owner of his Limited Partnership Interest despite any pledge or assignment of the same unless and until the pledgee and/or assignee of such Limited Partnership Interest has been admitted as a substituted Limited Partner pursuant to Sections 7.04, 7.05 and 7.06 of this Agreement.

(i) "Net Profit" or "Net Loss" shall mean the amount of net income or net loss shown on the Partnership's income tax return filed pursuant to the Internal Revenue Code of 1954, as amended, or any subsequent tax statute.

(j) "Operating Expenses" with respect to any period shall mean (i) all cash disbursements and expenses paid by the Partnership during said period including fees and all payments of principal and interest on outstanding loans and obligations and/or costs and other expenses

incurred in the course of running the Partnership's business during said period, plus (ii) the Cash Reserves set aside during said period.

(k) "Partners" shall mean collectively, the General Partner and the Limited Partners. Reference to a "Partner" shall mean any one of the Partners.

(l) "Partnership" shall mean Spirits of St. Louis Basketball Club, L.P.

(m) "Escrow Agent" shall mean Schupak, Rosenfeld & Fischbein.

"ARTICLE II

"Purposes and Business

"SECTION 2.01 Purposes of the Partnership. The business of the Partnership shall be to acquire, own and operate a professional basketball team in the American Basketball Association and to transact other business which may be authorized by the Articles of Limited Partnership.

"SECTION 2.02 Powers of the Partnership. In furtherance of the purposes and business of the Partnership, but subject to the provisions hereof, the Partnership shall have the power:

(a) to enter into, perform all acts, and carry out all contracts and agreements of every kind to, in connection with, or incidental to the accomplishment of the purposes and business of the Partnership;

(b) to borrow money, and to issue evidence of indebtedness and to secure the same by mortgage, deed

of trust, pledge or other lien, in furtherance of the Partnership's business, provided that any such borrowing shall not be prohibited hereunder; and

(c) to carry on any other activity necessary to or in onnection [sic] with or incidental to the foregoing.

"ARTICLE III

"Capital

"SECTION 3.01 Capital Contributions of General Partner. The General Partner's capital account and capital contribution to the Partnership shall consist of all sums advanced by the General Partner on behalf of the Partnership other than loans, together with any other amounts that the General Partner contributes to the Partnership.

"SECTION 3.02 Capital Contributions of Class I Limited Partners. Each Class I Limited Partner shall contribute the amount set forth next to his name on Schedule I hereof as his capital contribution. Payment of these amounts shall be made pursuant to the Subscription Agreement entered into by each Class I Limited Partner. The 1975 and 1976 payments shall be evidenced by promissory notes; upon request of the General Partner the 1976 payment shall be secured by a Letter of Credit acceptable to the Partnership. The Letters of Credit and promissory notes may be used as collateral for bank borrowings for Partnership purposes.

In the event that a Class I Limited Partner defaults in making payment of any installment of his capital contribution when due or faiis to make timely delivery to the Partnership of the promissory notes or Letter of Credit

and said default is not cured within twenty (20) days after notice has been given at the address indicated on Schedule I, then in addition to any other remedies available to the Partnership, the defaulting Limited Partner shall, at the option of the General Partner, be deemed to have forfeited his Partnership interest to the Class I Limited Partners in proportion to their interest (except as otherwise provided for in Section 7.09), which forfeiture shall be effective upon notice being mailed to such defaulting Limited Partner. Each Class I Limited Partner, for purposes of effectuating the forfeiture of his interest in the event of default, hereby constitutes the General Partner as his attorney-in-fact to execute any and all documents necessary to effectuate forfeiture of his interest in the Partnership.

"SECTION 3.03 Capital Contributions of Class II Limited Partners. The Class II Limited Partners shall contribute to the Partnership the amounts indicated on Schedule II.

"SECTION 3.04 Additional Calls. No Limited Partner shall be required or obligated to contribute any capital or lend any funds to the Partnership other than as provided in this Article III.

"ARTICLE IV

"Rights, Powers and Duties of the Partners

"SECTION 4.01 Management of Partnership Business. The General Partner shall have the sole right to manage the business of the Partnership. The General Partner shall use his best efforts to carry out the purposes

and business of the Partnership pursuant to this Agreement and shall devote to the Partnership business such time as reasonably shall be required for its success.

"SECTION 4.02 Powers of the General Partner. Subject to Section 4.03 hereof, or any other provisions hereof to the contrary, the General Partner shall have all of the powers of the Partnership and shall have all of the powers of a Partner in a Partnership without Limited Partners. Without limiting the foregoing, the General Partner shall have power to:

(a) Select and employ management and supervise such management;

(b) Sell, transfer, assign, convey, lease, sublet, mortgage or otherwise dispose of or deal with all or any part of the property of the Partnership;

(c) Borrow money, and to execute evidences of indebtedness and secure the same by mortgage, deed of trust, pledge or other lien, in furtherance of the Partnership's purposes and to satisfy the Partnership's obligations pursuant to the terms thereof provided the same shall not be prohibited hereunder;

(d) Execute and deliver such documents on behalf of the Partnership as he may deem necessary or appropriate in furtherance of the Partnership's business;

(e) Perform, or cause to be performed, all of the Partnership's obligations under any agreement to which the Partnership or any nominee of the Partnership is a party or bound by;

(f) Employ such managing or other agents, maintenance, administrative, or secretarial personnel or other

persons necessary for the operation and maintenance of the Partnership or to engage or retain attorneys, accountants or brokers to the extent such professional services are required during the terms of the Partnership;

(g) Determine, subject to the provisions hereof, the time and amount of distributions by the Partnership to the Partners;

(h) Open and maintain bank accounts for the deposit of Partnership funds, with withdrawals to be made upon such signature or signatures as the General Partner may, from time to time, designate;

(i) Subject to the provisions of Section 5.03, sell additional Units of Class I Limited Partnership Interests provided that no such sale shall in any manner adversely affect the allocation of the first losses to existing Class I Limited Partners during 1974, 1975 and 1976 as set forth in Section 5.01(2);

(j) Do any act or thing which is necessary and appropriate to carry out any of the foregoing.

"SECTION 4.03 Limitations on the Powers of the General Partner. Notwithstanding the provisions of Section 4.02 hereof, without the prior written consent of a majority of Limited Partners voting in the manner set forth in Section 4.09(a)(2), the General Partner shall not:

(a) Do any act in contravention of this Agreement, as amended from time to time;

(b) Do any act which would make it impossible to carry on the ordinary business of the Partnership;

(c) Confess a judgment against the Partnership;

(d) Possess Partnership property, or assign rights in specific Partnership property, for other than a Partnership purpose;

(e) Sell, lease, refinance, pledge, transfer, assign, or convey any substantial part of the property of the Partnership;

(f) Commingle the Partnership's funds with the funds of others; and

(g) Charge general overhead and administrative expenses of the General Partner to the Partnership. However, the Partnership will bear all direct costs and expenses incurred in the conduct of its business, including without limitation, all costs and expenses for legal, audit, accounting and other technical and professional services, reports, and other communications to investors, printing, postage, long distance telephone and telegraph, travel, insurance, interest, outside messengers, office supplies, data processing, taxes, permits and licenses.

"SECTION 4.04 Duties and Representations of General Partner.

In addition to and without limiting the customary duties and obligations of the General Partner as the general partner of a limited partnership or the specific duties and obligations of the General Partner set forth in other provisions of this Agreement or elsewhere contained, the General Partner shall in furtherance of Partnership business:

(a) Cause the Partnership to file and/or record an amended Agreement and Certificate of Limited Partnership or such other documents and to do such acts as shall

be required by the laws of the State of Delaware in order to preserve the valid status and existence of the Partnership and the limited liability of the Limited Partners for the duration of its term;

(b) Furnish the reports to the Limited Partners required by Section 4.06 hereof;

(c) Maintain complete and accurate records on transactions of the Partnership and the books and accounts of the Partnership;

(d) Cause tax returns to be signed and timely filed on behalf of the Partnership;

(e) The General Partner covenants to maintain a net worth of $250,000.

"SECTION 4.05 Books and Records. The General Partner shall maintain full and accurate books of the Partnership at the Partnership's principal place of business, showing all capital accounts, receipts, expenditures, assets, liabilities, profits and losses of the Partnership and all other records necessary for the recording of the Partnership's business and affairs. The books of the Partnership, for financial and tax purposes, shall be kept on a cash or accrual basis as determined by accountants retained by the Partnership. All documents, records and books pertaining to the Partnership shall at all times be available for inspection upon reasonable notice during reasonable business hours at the principal place of business of the Partnership

"SECTION 4.06 Reports. The General Partner shall render, or cause to be rendered, the following reports at the times hereinafter indicated:

Within 75 days after the end of each year, or as soon thereafter as is practicable, a balance sheet and a profit and loss statement for the preceding year prepared in accordance with generally accepted accounting principles consistently applied, and other information statements (including Schedule K-1 and other appropriate federal, state and local tax schedules, reports and statements), which reports and statements shall include all necessary tax reporting information required by the Partners for preparation of their respective income tax returns.

All decisions as to accounting matters, except as specifically provided herein, shall be made by the General Partner in accordance with Section 4.05, provided they are acceptable to the Partnership's independent certified public accountants.

"SECTION 4.07(1) Income Tax Elections. The Partnership shall treat as an expense for federal income tax purposes all amounts to which it is entitled which may, in accordance with applicable law and regulations, be considered an ordinary and necessary business expense deductible under applicable rules of the Internal Revenue Code of 1954, as amended (the "Code"), and the regulations promulgated thereunder. The General Partner shall make all applicable elections required by the Code, and shall make such elections as shall, in his best judgment, be in the best interests of the Limited Partners. The General Partner shall make the following specific election to the extent permissible: to use a calendar taxable year.

"SECTION 4.07(2) In the case of distribution of the property within the provisions of Section 734 of the Internal Revenue Code of 1954 or in the case of a transfer of a

Partnership interest permitted by this Agreement made within the provisions of Section 734 of such Code, the General Partner on behalf of the Partnership may, at his option, file an election under Section 754 of such Code in accordance with the procedures set forth in the applicable Treasury Regulations. If such an election is filed, the General Partner will be required to provide additional accounting or tax information with respect to any adjustment for any Limited Partner, provided such information is reasonably within the General Partner's knowledge.

"SECTION 4.08 Liabilities of General Partner. The General Partner shall not be liable to the Partnership or any other Partner for any actions taken in good faith and reasonably believed to be in the best interests of the Partnership of for errors of judgment, but shall only be liable for wilful misconduct, fraud, bad faith, gross negligence, breach of his obligations or representations under this Agreement or any other agreement with or undertaking to the Partnership.

"SECTION 4.09 Rights, Prohibitions and Liabilities of Limited Partners.

(a) Rights of Limited Partners.

(1) Limited Partners shall be entitled to the rights provided by the laws of the State of Delaware and as set forth elsewhere in this Agreement and shall not in any way be prohibited from or restrained from engaging in or owing an interest in any other business venture of any nature, including any venture which might be competitive with the business of the Partnership.

(2) At any meeting of the Partnership or on any matter which may be consented to without a meeting, each Class I Limited Partner shall be entitled to one vote for each unit owned (or a fraction of a vote corresponding to that fraction of a unit owned, if ownership is other than whole units with respect to any particular Class I Limited Partner), and Class II Limited Partners shall be entitled to a total of six (6) votes with each Class II Limited Partner entitled to such number of votes as his interest in the profits of Class II units bears to the interest of all Class II Limited Partners in profits allocated to Class II Limited Partners. All actions taken at any such meeting, or authorized to be taken, or consented to without a meeting, shall require a vote of the majority of the total number of possible Limited Partnership votes unless a higher vote is required by any other provisions hereof. Voting shall not be by Class unless the profits and/or losses of a particular Class are affected, in which case voting shall be by Class with a majority of each Class voting required to approve the action. Partners may vote in person or by proxy at such meeting. The General Partner shall cause to be mailed to each Limited Partner at the latest address appearing on the records of the Partnership a notice of the meeting indicating the time (which shall be no more than 30 days nor less than 10 days from the date of the notice) and the place at which the meeting shall be held.

(b) Prohibitions with Respect to Limited Partners. No Limited Partner shall, in his capacity as Limited Partner, have the right:

(1) to participate in the control of the business affairs of the Partnership, transact any business of behalf

of or in the name of the Partnership or have any power or authority to bind or obligate the Partnership;

(2) to require partition of the Partnership property or to compel any sale or appraisal of Partnership assets or sale of a deceased Partner's interest therein;

(3) except as provided herein, to sell, pledge, or assign any Unit he owns or to constitute the purchaser or assignee a substituted limited partner;

(4) to withdraw from the Partnership without consent of General Partner;

(5) have any agent represent his interest and participate in the management of the affairs of the Partnership.

(c) Liabilities of Limited Partners. No Limited Partner shall, in his capacity as Limited Partner, be personally liable for any debts of the Partnership or for any loss suffered by the Partnership in excess of his capital contribution together with any undistributed share of Partnership profits from time to time credited to a Limited Partner's account.

"ARTICLE V

"Allocations and Distributions

"SECTION 5.01(1) *Allocation of Current Items.* Except as otherwise provided for herein, for federal and state income tax purposes, the current items of profit and loss of the Partnership shall be allocated as follows:

Profit

Limited Partners		General
Class I	Class II	Partner
90%	8%	2%

Loss

Limited Partners		General
Class I	Class II	Partner
90%	8%	2%

"SECTION 5.01(2) *Special Allocations*. Notwithstanding anything in this Section 5.01 to the contrary, losses shall be allocated in 1974, 1975 and 1976 as follows:

(a) 1974: Losses determined by multiplying $240,000 by the number of Class I Limited Partnership Units, to the Class I Limited Partners: $240,000 per Unit. The balance shall be divided 2% to the General Partner and 98% to the Class II Limited Partners.

(b) 1975: Losses determined by multiplying $120,000 by the number of Class I Limited Partnership Units, to the Class I Limited Partners: $240,000 per Unit. The balance shall be divided 2% to the General Partner and 98% to the Class II Limited Partners.

(c) 1976: Losses determined by multiplying $100,000 by the number of Class I Limited Partnership Units, to the Class I Limited Partners: $100,000 per Unit. The balance shall be divided 2% to the General Partner and 98% to the Class II Limited Partners.

With respect to each of the foregoing years, and to the extent possible, the losses allocated to the Class I

Limited Partners shall, to the extent available, be comprised of: Partnership operating loss (Section 162 of the Internal Revenue Code) equal to 67% of the aggregate losses allocated to Class I Limited Partners; and additional Partnership loss equal to 33% of the aggregate losses allocated to the Class I Limited Partners resulting from expenses or losses deducted under authority of Section 162, Section 1231 or such other sections of the Code as deemed appropriate by the General Partner.

"SECTION 5.02 *Distribution of Certain Items.*

(a) The Cash Flow normal operations, when and if available, will all be distributed to the Partners in proportion to their interest in profits until such time as the Adjusted Capital Accounts of the Class I Limited Partners has been reduced to zero. Thereafter, distributions of cash flow shall be made as follows: 12% to the Class I Limited Partners, 2% to the General Partner, and 86% to the Class II Limited Partners. Any fees paid under Section 8.01 hereof shall be credited against the share of distributions to be made to the General and Class II Limited Partners.

(b) In the event of the sale or exchanging of a part or all of the Partnership assets, the available proceeds derived therefrom (after deduction of all expenses in connection therewith) shall be applied in the following order of priority:

(1) to the payment of all debts and liabilities of the Partnership, if any, outstanding and then due;

(2) to the setting up of Cash Reserves, provided, however, that at the expiration of such period of time as the General Partner deems advisable the balance of such

Reserves shall be distributed in the manner set forth in this Section 5.02(b);

(3) the distribution of the remaining proceeds as follows: The first proceeds shall be paid over to the Class I Limited Partners until their Adjusted Capital Accounts have been reduced to zero; then the proceeds shall be paid over to the Class II Limited Partners until their Adjusted Capital Accounts have been reduced to zero; then to any General Partner who previously were removed, deceased, or withdrew in accordance with Section 7.02(c) until its Adjusted Capital Account is reduced to zero; then to the existing General Partner until its Adjusted Capital Account has been reduced to zero; thereafter, proceeds shall be distributed 9.75% to the Class I Limited Partners, 2% to the existing General Partner, and 88.25% to the Class II Limited Partners.

(c) Anything contained herein to the contrary notwithstanding, in the event that any distributions made pursuant to Section 5.02(a) through (b) are less than the profits allocated to the Limited Partners for federal and state income tax purposes pursuant to Section 5.01, then such allocations shall be adjusted so that the amount of distributions to the Limited Partners equals the profits allocated to them pursuant to Section 5.01 for the taxable year.

"SECTION 5.03 *Sale of Additional Limited Partnership Units*. The General Partner may offer additional units of Partnership interest subject to the following conditions:

(a) Such additional units which the General Partner proposes selling shall be first offered in writing to Limited Partners in proportion as their interests in the profits

of the Partnership bear to the profits interests of all Limited Partners. The offer shall be made by registered or first class mail and shall remain in effect for a period of five days after the postmarked date of the offer. Each Limited Partner who wishes to accept the offer must do so within such five day period by communicating in writing with the General Partner. Payment for the units shall then be made in the manner directed by the General Partner.

(b) Any units remaining unsubscribed for after the offer made in subsection (a) above may then be purchased by the General Partner or offered to new investors.

(c) In no event shall the sale of additional Partnership interests pursuant to this Section 5.03 adversely affect the allocation of first losses allocated to existing Limited Partners during 1974, 1975 and 1976 as set forth in Section 5.01(2).

"ARTICLE VI

"Management

"SECTION 6.01 *Management Agreement*. The General Partner may cause the Partnership to enter into an agreement with it or an affiliate with respect to management services.

"ARTICLE VII

"Change in Partners

"SECTION 7.01 *Restrictions on the General Partner*. Except as otherwise provided herein, the General Partner

shall not, without the written consent of a majority interest of Limited Partners, substitute any person, firm or corporation in its stead or sell, assign, transfer, or otherwise dispose of or pledge, hypothecate, or otherwise encumber his interest in the Partnership, or admit any person, firm or corporation as an additional General Partner.

"SECTION 7.02 *Retirement, Death, Etc. of General Partner.*

(a) *Bankruptcy, Insolvency, Etc.*

(i) In the event that the General Partner retires, dies, becomes mentally ill, bankrupt or insolvent or makes an assignment for the benefit of its creditors or for any reason is unable to perform his duties or obligations hereunder, under circumstances where there is a Co-General Partner, the Co-General Partner shall carry on the business of the Partnership and the General Partner shall immediately cease to be a Partner and his interest in the Partnership shall be disposed of as set forth hereinbelow. The Limited Partners may by majority vote select a new General Partner to serve in addition to the Co-General Partner.

(ii) In the event that the General Partner retires, dies, becomes mentally ill, bankrupt or insolvent (as defined in Section 7.08 hereof) or makes an assignment for the benefit of its creditors hereunder under circumstances where the General Partner is the sole General Partner of the Partnership, then the Limited Partners as soon as practicable shall (unless the laws of the State of Delaware require otherwise or unless the Partnership would, in the opinion of counsel to the Partnership, be

considered to have terminated for federal income tax purposes or not be treated as a partnership for federal income tax purposes) promptly elect to:

(A) continue the business of the Partnership by the formation of a new partnership; or

(B) admit a new general partner or partners to continue the Partnership business; or

(C) terminate the Partnership.

Immediately after the Limited Partners have made an election as set forth in (A) or (C) above or in the event the Limited Partners made an election pursuant to subparagraph (B) above, then immediately after the admission of the new General Partner, the General Partner shall cease to be a Partner and his interest in the Partnership shall be disposed of as set forth hereinbelow.

(b) *Removal of General Partner.* To the extent permitted by the laws of the State of Delaware, without subjecting the Limited Partners to unlimited liability as general partners:

(i) Upon the vote of 90% in interest of the Limited Partners the General Partner may be removed from the Partnership because of incompetence, malfeasance, misfeasance, nonfeasance, breach of any material requirement, obligation or representation under this Agreement or otherwise; and the remaining General Partner or General Partners shall continue the business of the Partnership. If, however, there then is no General Partner(s) remaining, a new general partner, who shall become a general partner prior to the date when such removal is

effective, shall at the same time be elected by a majority in interest of the Limited Partners.

(ii) Written notice of the removal of the General Partner shall be served upon it or him either by certified or by registered mail, return receipt requested, or by personal service. Said notice shall set forth the day upon which the removal is to become effective, which date shall not be before a new General Partner is elected and admitted pursuant to the terms hereof unless the General Partner is not the sole General Partner or unless the Limited Partners unanimously elect to terminate the Partnership, in which event the removal may be effective immediately upon serving notice to the General Partner.

(iii) Upon receipt of such a notice, the General Partner shall cause an accounting to be prepared covering the transactions of the Partnership since the end of the previous year and thereafter the removed General Partner shall not act in connection with any Partnership business.

(iv) The new General Partner, if one is appointed pursuant to the provisions of subsection (i) of this Section 7.02, shall have sufficient financial worth considering the nature and extent of its obligations hereunder and shall agree to assume all of the duties and obligations of a general partner of a partnership.

(c) In the event that the General Partner ceases to be a General Partner by reason of the provisions of Section 7.02(a)(i) or (ii) or 7.02(b) above, then his capital account and interests in allocation and distribution pursuant to Article V hereof shall be assigned to the new General Partner, if any, selected by the Limited Partners to the

extent necessary to induce the new General Partner to act in said capacity. If the Partnership business is carried on by the Co-General Partner alone, without the admission of a new General Partner, then the General Partner's interest in allocation and distribution pursuant to Section 5.01(1) and 5.02(a) shall be assigned to the Co-General Partner, as well as 10% of the General Partner's capital account.

Thereafter, the retiring General Partner's interest in the profits and losses and/or cash flow shall cease. The retiring General Partner's capital account shall then be further reduced by the sum of (1) the monies expended or to be expended by or on behalf of the Partnership in connection with the removal of the General Partner and the admission of a new General Partner, plus (2) an amount determined by the Co-General Partner and/or new General Partner in their sole discretion, that is equivalent to the obligations of the retiring General Partner to the Partnership remaining outstanding at the time he ceases to be a General Partner. The balance remaining in the General Partner's capital account shall be repaid out of the proceeds of sale or refinancing and the provisions of Section 5.02(b) and (c) shall be applicable, except that the retiring General Partner shall in no event be entitled to receive more than the balance remaining in his capital account after the application of this paragraph.

"SECTION 7.03 *Restrictions on Limited Partners.* A Limited Partner may sell, assign, transfer, or otherwise dispose of or pledge, hypothecate or otherwise encumber his interest in the Partnership or any part thereof (including any right to participate in the profits and/or losses of the Partnership) in the manner set forth in Sections 7.04

and 7.05 hereof. Unless such person is admitted as a Limited Partner by the General Partner he shall not have the rights of a Limited Partner hereunder.

"SECTION 7.04 *Transfers to Permitted Transferees.*

(a) Subject to the provisions of this Section 7.04, the interest of a Limited Partner may be devised, bequeathed, or otherwise transferred by reason of the death of the Limited Partner to the following persons ("Permitted Transferees") without the prior consent of the General Partner:

(i) any person who is otherwise a Partner;

(ii) any "related person" which for the purposes hereof shall include the spouse, parents, grandparents, parents-in-law, descendants, siblings, descendants of siblings, brothers-in-law, sisters-in-law, or children-in-law of any individual Partner and any entity, directly or indirectly, in control of, controlled by or under common control with any Partner; and

(iii) his estate, heirs, or legal representatives in case of death or his legal representatives in case of incapacity.

(b) Each Permitted Transferee shall (i) deliver to the General Partner applicable proof of succession to the interest of the transferor partner, together with an assumption by the Permitted Transferee of the duties and obligations of a Limited Partner hereunder and (ii) execute such other instruments as the General Partner reasonably shall deem necessary to constitute such Permitted Transferee a Partner of the Partnership.

(c) The General Partner may require any Permitted Transferee to represent that he is acquiring the interest for his own account for investment and not with a view to the sale or distribution thereof.

(d) In the case of each such transfer, the Limited Partner shall cause to be delivered to the General Partner an opinion of counsel, in form and substance satisfactory to the Partnership's counsel, to the effect that (i) such transfer will not impair the ability of the Partnership to be taxed as a partnership or to take advantage of accelerated depreciation under federal income tax law, and (ii) such transfer will not violate federal securities laws or applicable state securities laws.

(e) The transfer to a Permitted Transferee may be made by will, trust (whether inter-vivos or testamentary) or by operation of law.

"SECTION 7.05 *Transfers to Other Persons.* Except as provided in Section 7.04, a Limited Partner may sell, assign, transfer or otherwise dispose of his interest in the Partnership to any person who is not a Permitted Transferee, and who wishes to become a substituted Limited Partner, only upon the following terms and conditions:

(a) A Limited Partner may assign all or any part of his interest in the Partnership to a person who is, or is lawfully empowered to become and becomes, a Limited Partner in the Partnership in respect of such interest or such part thereof only if prior thereto either the General Partner in his sole discretion consents in writing to such assignment and only if (i) the General Partner is satisfied that (1) such person meets the standards initially required of Limited Partners with respect to net worth, income and

residence and (2) the assignment will not impair the ability of the Partnership to be taxed as a partnership or to take advantage of accelerated depreciation under the federal income tax laws and (ii) such person furnishes (1) an opinion of counsel, satisfactory in form and substance to the Partnership's counsel, to the effect that such assignment will not violate the federal securities laws or applicable state securities laws and (2) an instrument, in form and substance satisfactory to the General Partner in which such person represents that he is acquiring the interest for his own account for investment and not with a view to tne sale or distribution thereof and agrees to comply with the terms of this Agreement and to execute any and all documents that the General Partner may deem necessary in connection with the assignment of such interest in the Partnership and admission of such person as a Limited Partner.

(b) If a Limited Partner becomes bankrupt, the trustee or receiver of such Limited Partner shall have all of the rights of a Limited Partner for the sole purpose of settling the business of such limited Partner; provided, however, that if the General Partner in his sole discretion after taking into account the factors set forth in Section 7.05(a) hereof to the extent applicable, consents in writing to an assignment, such trustee or receiver, or an assignee thereof, may be substituted as a Limited Partner in the Partnership.

(c) If the General Partner consents to the admission of a person as a substituted Limited Partner, this Agreement shall be amended in accordance with the provisions of the laws of the State of Delaware. All other steps shall be taken which, in the opinion of the General Partner, are

necessary to admit such person under the Partnership Act as a substituted Limited Partner, and such person shall thereupon become a substituted Limited Partner within the meaning of the Act.

(d) The General Partner may, but shall not be obligated to, acquire one or more Limited Partnership Units from any Limited Partner, with the consent of said Limited Partner, and, if with respect to such Limited Partnership Units or Unit the General Partner becomes a Substituted Limited Partner within the meaning of the Partnership Act, the General Partner shall, with respect to the Unit or Units purchased, enjoy all the rights and be subject to all the obligations and duties of a Limited Partner.

"SECTION 7.06 *General Conditions.*

(a) All costs and expenses incurred by the Partnership in connection with any disposition of a Partnership interest or any part thereof pursuant to this Article and another person's becoming a Substituted Limited Partner in the Partnership in respect of such interest or such part thereof, including any filing, recording and publishing costs and the fees and disbursements of counsel, shall be paid by the Partner disposing of such interest or part thereof.

(b) If the interest, or any part thereof, of a Limited Partner in the Partnership is transferred pursuant to this Article, such Limited Partner shall, unless otherwise agreed upon between the Limited Partner and Transferee, with the consent of the General Partner, for the purposes of Section 5.01 hereof, be allocated (i) that portion of the Current Items of the Partnership allocable to such interest

or part thereof based upon the number of days during the taxable year of the Partnership that he owned such interest or part thereof and (ii) that portion of the Capital Items of the Partnership allocated to such interest or part thereof based upon the date on which the event giving rise to such Capital Items occurred, and the successor of such Partner shall be allocated the remainder of the Current Items and Capital Items of the Partnership allocable to the interest or part thereof so transferred. For the purposes of Section 5.02 hereof, distributions of the Partnership shall be made only to persons who are Partners on the date of such distributions.

(c) At the request of a Substituted Limited Partner or of the executor or administrator of a deceased Limited Partner, the General Partner may, at his option, file on behalf of the Partnership an election under Section 754 of the Internal Revenue Code of 1954, as amended, permitting adjustments to basis as provided for in Section 734 and 743 thereof.

"SECTION 7.07 *Effects of Change in Partners.* Subject to all of the provisions of this Agreement, the death, withdrawal, retirement, insanity, bankruptcy or substitution of any Limited Partner shall not interrupt the continuity of or cause the termination or dissolution of the Partnership. The removal, withdrawal, retirement, incapacity or bankruptcy of the General Partner shall not interrupt the continuity of or cause the termination or dissolution of the Partnership, provided the business is continued by the remaining General Partner or Partners or a Substitute General Partner appointed by the Limited Partners as provided in Article VII hereof and he or it

assumes the duties and obligations of the General Partner hereunder.

"SECTION 7.08 *Definition of Bankruptcy*. For the purpose of this Article VII, a Partner shall be deemed to be bankrupt if:

(a) An involuntary petition under any bankruptcy or insolvency law or under the reorganization provisions of any such law is filed with respect to such Partner or a receiver of or for the property of such Partner is appointed without the acquiescence of such Partner, which petition or appointment remains undischarged or unstayed for an aggregate period of thirty days (whether or not consecutive); or

(b) A voluntary petition under any bankruptcy or insolvency law or under the reorganization provisions of any such law is filed by such Partner, a voluntary assignment of such Partner's property for the benefit of creditors is made, a receiver of or for the property of such Partner is appointed by or acquiesced in by such Partner or such Partner does any similar act of like import.

"SECTION 7.09 *Admission of Additional Limited Partners*. Anything contained herein to the contrary notwithstanding, the General Partner may admit additional Class I Limited Partners to replace any Class I Limited Partner that has withdrawn from the Partnership or that has forfeited his interest in the Partnership by virtue of the provisions of Section 3.02 hereof, provided, however, that the incoming Class I Limited Partner to the Partnership assumes any unsatisfied obligation of the withdrawing or defaulting Limited Partner to the Partnership to make capital contributions. In the event an additional Limited

Partner is admitted pursuant to the provisions hereof, said Class I Limited Partner shall be entitled to all allocations of profit and losses and other distributions as if he were a Limited Partner as of January 1st of the year in which he is admitted.

"ARTICLE VIII

"Termination of the Partnership

"SECTION 8.01 *Events of Termination*. The Partnership shall be terminated and dissolved, and its assets liquidated, pursuant to Section 8.02 hereof, upon the happening of the earlier of:

(a) 50 years from the date of this Agreement;

(b) the sale, distribution or condemnation of all or substantially all, or the abandonment of, the business, assets and properties of the Partnership, unless at least 70% of the Limited Partners consent to continue the Partnership;

(c) 60 days after the execution of a written consent to termination by consent of at least 70% in interest of Limited Partners of the Partnership, provided, however, that copies of consent must be promptly mailed to the General Partner and the other Limited Partners; or

(d) in the event that the Partnership is deemed terminated or no longer treated as such for federal income tax purposes, unless at least 70% in interest of the Limited Partners elect otherwise. The Partnership shall continue to exist following the happening of any of the foregoing events solely for the purpose of winding up its affairs.

"SECTION 8.02 *Dissolution of the Partnership.* In the event of a termination of the Partnership pursuant to Section 8.01 hereof, the General Partner (or in the event of a termination by reason of the bankruptcy, withdrawal, insanity or retirement of the General Partner, a special liquidator appointed by a majority interest of the Limited Partners of the Partnership) shall immediately commence to wind up the Partnership's affairs and shall liquidate the assets of the Partnership as promptly as possible, but in an orderly and businesslike manner, so as not to involve undue sacrifice. Sale, disposition or refinancing of the property within 24 months of the date of termination of the Partnership may be made upon consent of a majority in interest of the Limited Partners of the Partnership. In connection with any such winding up and liquidation, the independent certified public accountant then retained by the Partnership shall audit a statement setting forth the assets and liabilities of the Partnership as of the date of dissolution, and such audited statement shall be furnished to all Partners. The proceeds of such liquidation shall be applied and distributed in the order of priority provided in Section 5.02(b) hereof.

"SECTION 8.03 *Instruments of Dissolution.* Upon the termination of the Partnership, the General Partner and/or the special liquidator shall make such filings and do such other acts as shall be required by the laws of the State of Delaware to effect such termination, and the Partners hereby agree to execute such certificates or documents as shall be required.

(Illegible) *Termination.* (a) Upon the termination of the (Illegible) of further intention of exploiting the properties or business of the Partnership, but subject to the right of

the General Partner and/or special liquidator to continue the business of the Partnership solely for the purpose of winding up its affairs, the assets of the Partnership which are suitable for distribution in kind shall, in the discretion of the General Partner and/or special liquidator, be distributed in kind, provided, however, that to the extent that the General Partner and/or special liquidator, in his sole discretion, determines that any asset is not suitable for an equitable distribution in kind, the assets of the Partnership shall be liquidated as promptly as practicable. In determining the method of liquidation of the Partnership's assets, the General Partner agrees to keep in mind the lower prices often received on sales of properties at forced (or rumored to be forced) sales. The cash proceeds from sales of Partnership and other assets of the Partnership shall be applied and distributed in the order of priority provided in Section 5.02 hereof.

(b) Anything contained in subsection (a) of this Section 8.04 to the contrary notwithstanding, upon the termination of the Partnership, the General Partner may elect to continue the business of the Partnership solely for the purpose of seeking out the highest bidder for the assets of the Partnership, which may be offered either in total or individually. Upon obtaining bona fide bids, the General Partner shall have the option of purchasing the assets upon the same terms contained in the highest bid obtained from a bona fide third party. The purchase price, at the option of the General Partner, shall be payable over a five (5) year period. The obligation shall be represented by promissory notes bearing interest at the rate of 8% per annum. The notes shall provide that they may be prepaid in whole or in part from time to time, without penalty.

Cash proceeds shall be applied and distributed in the order of priority provided in Section 5.02 hereof.

"SECTION 8.05 *Sale of Assets Upon Liquidation.* In liquidating the assets of the Partnership, all assets of a saleable value, which the General Partner and/or special liquidator determines are not suitable for an equitable distribution in kind, shall be sold at public or private sales as the General Partner and/or special liquidator may deem advisable. It is agreed that any partner may purchase said assets at such sale. The General Partner and/or special liquidator shall give written notice (in which the assets to be sold and the time, date, location and condition of sale shall be specified) to the Limited Partners of such liquidating sale of all or part of the Partnership's assets.

"ARTICLE IX

"Amendments

"SECTION 9.01 *Authority to Amend.*

(a) This Agreement may be amended upon the determination of the General Partner without the consent or approval of the Limited Partners if such amendment is (i) for the purpose of admitting Substituted Limited Partners to the Partnership, or (ii) for the purpose of clarification and does not change the substance hereof, and the Partnership has obtained the opinion of its counsel to that effect, or (iii) necessary or appropriate, in the opinion of counsel of the Partnership, to satisfy the requirements of the Internal Revenue Code with respect to partnerships or of any federal or state securities laws or regulations, provided such amendment does not adversely affect the

interests of Limited Partners. Any amendment under subsection (iii) hereof shall be effective as of the date of this Agreement.

(b) Except as provided in Section 9.01(a), amendments to this Agreement shall be made only with the approval of the Limited Partners pursuant to the provisions of Section 9.02 hereof. No amendment shall be made pursuant to any provision of this Section 9 which would adversely affect the federal income tax treatment to be afforded Limited Partners, adversely affect the liabilities of Limited Partners as provided herein or adversely change the method of distribution or allocation of net profits, net losses or cash flow as provided in Section 5 without disclosure of such fact to the Limited Partners and approval of Limited Partners.

"SECTION 9.02 Approval of Limited Partners. Except as otherwise provided, the General Partner shall obtain a written consent or approval, or the affirmative vote at a meeting, or the owners of a majority in interest of the Limited Partners entitled to vote or give such consent or approval with respect to any amendment other than an amendment allowed pursuant to Section 9.01(a) hereof. Voting shall occur in the manner set forth in Section 4.09(a)(2).

"SECTION 9.03 Notice of Amendments. A copy of any amendments to be approved by the Limited Partners pursuant to Section 9.02 shall be mailed in advance to the Limited Partners. Partners shall be notified as to the substance of any amendment pursuant to Section 9.01 hereof, and upon request shall be furnished a copy thereof.

"ARTICLE X

"Power of Attorney

"SECTION 10.01 Each of the Limited Partners hereby appoints the General Partner with power of substitution and any successor General Partner his true and lawful attorney-in-fact with full power and authority in said Limited Partner's name, stead and place, from time to time, to make, execute, sign, acknowledge and file with respect to the Partnership:

(a) A Certificate of Amended Certificate of Limited Partnership under the laws of the State of Delaware or any other state and including therein all information required by the laws of each such state;

(b) Any agreements or amendments thereto provided for herein;

(c) To make any other change in any provision of this Agreement provided there has been compliance with all of the provisions of this Agreement, including obtaining the required consent or approval of a specified percentage in interest of the Limited Partners;

(d) Such certificates, instruments and documents as may be required by, or may be appropriate under, the laws of the State of Delaware in connection with the use of the name of Partnership by the Partnership;

(e) Such certificates, instruments and documents which may be required or appropriate (i) to reflect any changes in or amendments to this Agreement, including the admittance of new or substituted Limited Partners; or (ii) to effectuate the dissolution and termination of the

Partnership and the cancellation of the Certificate, as amended from time to time; and

(f) All such other instruments, documents and certificates which may, from time to time, be required by the laws of the State of Delaware, the United States of America, or any other jurisdiction in which the Partnership shall determine to do business, or any political subdivision or agency thereof, to effectuate, implement, continue and defend the valid and subsisting existence of the Partnership.

SECTION 10.02 Each of such agreements, certificates, instruments and documents referred to in Section 10.01 hereof shall be in such form as said attorney-in-fact and counsel for the Partnership deem appropriate. The powers hereby conferred to make agreements, certificates, instruments and documents shall include the powers to sign, execute, acknowledge, swear to, verify, deliver, file, record and publish the same.

"SECTION 10.03 Each Partner authorizes said attorney-in-fact to take any further action which said attorney-in-fact shall consider necessary or convenient in connection with any of the foregoing, hereby giving said attorney-in-fact full power and authority to do and perform each and every act and thing whatsoever requisite and necessary to be done in and about the foregoing as fully as said Partner might or could do if personally present, and hereby ratifying and confirming all that said attorney-in-fact shall lawfully do or cause to be done by virtue hereof.

"SECTION 10.04 The power of attorney granted under Section 10.01 hereof:

(a) is a special power of attorney coupled with an interest and is irrevocable;

(b) may be exercised by such attorney-in-fact by listing all of the Limited Partners executing any agreement, certificate, instrument or document with the single signature of such attorney-in-fact acting as attorney-in-fact for all of them;

(c) shall survive the delivery of an assignment by a Limited Partner of the whole or a portion of his interest in the Partnership, except that where such assignment is of such Limited Partner's entire interest in the Partnership and the purchaser, transferee of assignee thereof (with the consent of the General Partner), is admitted as a Substituted Limited Partner, the power of attorney shall survive the delivery of such assignment for the sole purpose of enabling such attorney-in-fact to execute, swear to, acknowledge, and file any such agreement, certificate, instrument or document necessary to effect such substitution.

"SECTION 10.05 The General Partner hereby appoints the Co-General Partner if any, or any person, firm or corporation substituted as General Partner in his place and stead pursuant to the terms of this Agreement, as his true and lawful attorney-in-fact with full power and authority in his name, place and stead, to make, execute, acknowledge, and file any documents, agreements, amendments, instruments, or otherwise necessary or appropriate to effectuate any of the terms and conditions of Article VII hereof.

"ARTICLE XI

"Miscellaneous

"SECTION 11.01 Indemnification. The Partnership shall indemnify and save harmless the General Partner from any loss or damage incurred by them by reason of any act performed by them for and on behalf or the Partnership and in furtherance of its interest, provided that such act or acts were done in good faith and on behalf of the Partnership and were not due to negligence, wilful misconduct, malfeasance, misfeasance, nonfeasance, on the part of a General Partner. Such indemnification shall be made from assets of the Partnership and no Limited Partner shall be personally liable to any indemnitee.

"SECTION 11.02 Waiver of Partition. Each of the parties hereto irrevocably waives during the term of the Partnership any right to maintain any action for partition with respect to the property of the Partnership.

"SECTION 11.03 Litigation. The General Partner shall prosecute, defend and appeal such actions at law or in equity as may be necessary to enforce or protect the interests of the Partnership and cause the Partnership to respond to any final decree, judgment or decision of any court, board of authority having jurisdiction in the premises. The General Partner shall satisfy any such judgment, decree, or decision first out of any insurance proceeds available therefor and next out of the assets of the Partnership.

"SECTION 11.04 Partnership Property. The legal title to the real or personal property or interest therein now or hereafter acquired by the Partnership shall be owned,

held or operated in the name of the Partnership or its nominee and no Partner, individually, shall have any ownership of such property.

"SECTION 10.05 Acceptance of Prior Acts by New Partners. Each person becoming a Partner, by becoming a Partner, ratifies and agrees to be bound by all action duly taken by or on behalf of the Partnership, pursuant to the terms of this Agreement, prior to the date such person becomes a Partner except that no Limited Partner shall have any liability beyond the amount of his capital contribution.

"SECTION 11.06 Notices. Any notice, payment, demand or communication required or permitted to be given by the provisions of this Agreement shall be deemed to have been sufficiently given or served for all purposes if delivered personally to the party or to an officer of the party to whom the same is delivered, or if sent by registered or certified mail, postage and charges prepaid addressed as follows:

If to the General Partner:

To: Pak Fabrics, Inc.
c/o Schupak, Rosenfeld & Fischbein
555 Madison Avenue
New York, New York 10022

If to the Limited Partner, at such Limited Partner's address as shown on the records of the Partnership, or to such other address as shall be furnished in writing by any party to the other. Any such notice shall be deemed to be given as of the date so delivered, if delivered personally, or as of the date on which the same was deposited with adequate postage in a regularly maintained receptacle for

the deposit of United States mail, addressed and sent as aforesaid.

Copies of all such notices shall be sent to Messrs. Schupak, Rosenfeld & Fischbein, 555 Madison Avenue, New York, New York 10022.

"SECTION 11.07 Captions. The title and captions contained herein are for convenience only and shall be deemed part of the context of this Agreement.

"SECTION 11.08 Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Agreement.

"SECTION 11.09 Agreement for Further Execution. At any time, or times upon the request of the General Partner, the Partners, both General and Limited, agree to sign and swear to the Certificate required by the laws of the State of Delaware, to sign and swear to any amendment or to cancellation of such certificate whenever such amendment or cancellation is required by law and cause the filing of any of the same for record wherever such filing is required by law.

"SECTION 11.10 Meetings. Meetings of the Partners may be called by the General Partner and shall be called upon the written consent of Limited Partners having an aggregate Partnership percentage of at least 25%. All notices and/or requests for meetings shall state the nature of the business to be transacted. Partners may vote in person or by proxy at such meetings.

"SECTION 11.11 Governing Law. This Agreement and the rights of the parties hereunder shall be interpreted in accordance with the laws of the State of Delaware.

"SECTION 11.12 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall constitute one agreement, and the signature of any party to any counterpart shall be deemed to be a signature to, and may be appended to, any other counterpart.

"SECTION 11.13 Parties in Interest. Subject to the provisions contained in Section 7.03 and 7.04 hereof, each and all of the covenants, terms, provisions and agreements herein contained shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, assigns, successors and legal representatives.

"SECTION 11.14 Gender. All words herein the male gender shall be deemed to include words in the female gender wherever the contract shall so require.

"SECTION 11.15 Time. Time is of the essence of this Agreement.

"SECTION 11.16 Date of Agreement, Effectiveness. Subject to the provisions of Article I, this Agreement shall be dated as of the date and shall be effective to constitute the Limited Partners signatories hereto as Limited Partners in the Partnership when this Agreement and/or any Certificate of Limited Partnership as may be required by law to qualify the Partnership as a limited partnership shall have been filed.

"SECTION 11.17 Fiscal Year. The fiscal year of the Partnership shall begin on the first day of January and

end on the 31st day of December in each year except the first year of operation which may commence subsequent to January 1.

"SECTION 11.18 Banking. All funds of the Partnership shall be deposited in St. Louis and/or New York in a separate bank account or accounts as shall be determined by the General Partner. All withdrawals shall be made upon checks signed by the General Partner, or his designee or designees.

"SECTION 11.19 Survival. All of the representations and warranties contained herein shall be true as of the date hereof and shall survive the signing hereof.

"SECTION 11.20 Arbitration. Any dispute arising under, out of, in connection with, or in relation to this Agreement, or any breach thereof, shall be determined and settled by arbitration, in the City of New York pursuant to the rules then obtaining of the American Arbitration Association. Any award rendered shall be final and conclusive upon the parties and judgment thereon shall be entered in any court of competent jurisdiction. Three arbitrators shall be appointed, one of whom shall be appointed by the General Partner, one by the Limited Partners, and the third appointed by the other two arbitrators. If any party fails to appoint an arbitrator, such arbitrator or arbitrators shall be appointed by the President or Chairman of the Board of the American Arbitration Association. This section is not applicable to any disputes, claims or rights or liabilities asserted under any federal or state securities or "blue sky" laws.

"SECTION 11.21 Entire Agreement. This Limited Partnership Agreement contains the entire agreement

among the parties hereto and supersedes and amends any prior agreement between any of the parties hereto with respect to the Partnership and in the event of any conflict in the terms contained herein or the terms of any other agreement, the terms of this Agreement shall control.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day, month and year first above written.

AS GENERAL PARTNER:

/s/ Robert S Beeresteer
Witness

/s/ Harry Weltman, President
PAK FABRICS, INC.

Sworn to before me this 31st
day of December, 1974.

/s/ Donald Schupak
Notary Public

DONALD SCHUPAK
Notary Public, State of New York
No. 24-3544090
Qualified in Kings County
Commission Expires March 30, 1975

PAK FABRICS, INC. AS ATTORNEY-IN-FACT FOR:

CLASS I Limited Partners	)	
Frank Sands	)	
Max Grossman	)	
Valerie Simpson	)	
Nate Good in	)	
Seymour Morris	)	
Donald Calaman	)	
Twin Oaks Associates	)	
Richard Larner	)	
Bruce Grassfield	)	
CLASS II Limited Partners	)	
Ozzie Silna	)	PAK FABRICS, INC.
Daniel Silna	)	
Donald Schupak	)	BY /s/ Harry Weltman, Pres.
Stanley Fleischer	)	
Barry Florescue	)	

Here follows Powers of Attorney (at pages 102-103 of the Transcript On Appeal) for the 13 individuals and for Twin Oaks Associates (shown on Schedules I and II which follow) in which the individuals and the entity:

* * *

" . . . irrevocably constitute and appoint Donald Schupak Esq.

* * *

(a) To file the Limited Partnership Agreement and to make any agreements or amendments to the Limited Partnership Agreement of the Partnership ("the Agreement") provided therein;"

* * *

SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.
SCHEDULE I TO LIMITED PARTNERSHIP
AGREEMENT CLASS I LIMITED PARTNERS

NAME AND ADDRESS	UNITS	CONTR. MADE	CONTR. DUE 1975	CONTR. DUE 1976
Franklin Sands 822 East 19th Street Brooklyn, New York 11230	1/8	$7,500	$7,500	$6,250
Max Grossman 983 Park Avenue New York, New York 10028	1	60,000	60,000	50,000
Valerie Simpson 332 West 77th Street New York, New York	1/2	30,000	30,000	25,000
Nate Goodwin 6269 West Port Avenue Milwaukee, Wisconsin	1/2	30,000	30,000	25,000
Seymour Morris 136 Wilshire Road Rochester, New York 14613	1/8	7,500	7,500	6,250

NAME AND ADDRESS	UNITS	CONTR. MADE	CONTR. DUE 1975	CONTR. DUE 1976
Donald Calaman 121 Marlborough Road Brooklyn, New York 11226	1/8	7,500	7,500	6,250
Twin Oaks Associates	2	120,000	120,000	100,000
Richard Larner 26 North Hillside Ave. Livingston, New Jersey	3/8	22,500	22,500	18,750
Bruce Grassfield 24 Shinners Park Marblehead, Mass.	1/8	7,500	7,500	6,250

SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P.
SCHEDULE II TO LIMITED PARTNERSHIP AGREEMENT CONTAINING
CLASS II LIMITED PARTNERS

NAME AND ADDRESS	Percentage Interest (After Class I Units)		CONTRIBUTIONS
	Profits	Losses	
Ozzie Silna 603 Wilmerding Avenue Teaneck, New Jersey 07666	44.25%	49.25% 1,2	$250,000 to be made on or before 12/31/74 or as required for working capital
Daniel Silna 15 Emery Lane Woodcliff Lake, New Jersey	44.25%	49.25% 1,2	$250,000 to be made on or before 12/31/74 or as required for working capital
Donald Schupak 299 Garfield Place Brooklyn, New York	10.0%	0.0%	$100
Stanley Fleischer 230 DeSoto Place Cliffside Park, New Jersey	1.0%	1.0%	$5,000.00 to be contributed on or before 12/31/74 and $25,000 on or before 12/31/75

[1] Mr. Fleischer will receive losses only until cumulative losses equal his investment.

NAME AND ADDRESS	Percentage Interest (After Class I Units)		CONTRIBUTIONS
	Profits	Losses	
Barry Florescue 3220 Bayview Drive Fort Lauderdale, Florida	0.5%	0.5%[1]	$15,000 to be contributed on or before 4/15/75

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[2] Mr. Florescue will receive losses commencing in 1975 in a cumulative amount equal to his investment.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN, Plaintiff,	)	No. 87-91C (A)
vs.	)	
OZZIE SILNA, DANIEL SILNA, DONALD SCHUPAK, SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P., and PAK FABRICS, INC., d/b/a PAK FABRIC SALE COMPANY, Defendants.	)	

MEMORANDUM OPINION

(Filed Sep. 21, 1988)

This case concerns a dispute arising out of a limited partnership agreement. Plaintiff, Harry Weltman (hereinafter Weltman), filed suit for damages resulting from an alleged breach of a limited partnership agreement and an accounting of the funds owing under the agreement. The documents in question are comprised of a Certificate of Limited Partnership of Spirits of St. Louis Basketball Club, L.P., dated October 14, 1974 (hereinafter the partnership agreement); and a Certificate of Amendment filed with the Secretary of State of the State of Delaware on April 15, 1975 (hereinafter the amendment). The facts giving rise to this dispute are as follows:

In 1973, Weltman was contacted by defendant, Donald Schupak (hereinafter Schupak). Schupak asked Weltman to locate a sports franchise for Schupak and two

of his clients. Weltman was successful in finding an American Basketball Association (hereinafter ABA) franchise available for purchase. This franchise was acquired by a limited partnership, and was moved to St. Louis, Missouri, where it became the St. Louis Spirits Basketball Club (hereinafter Spirits) during the 1974-75 and 1975-76 ABA seasons. The limited partnership was evidenced by the partnership agreement which named the following partners: Pak Fabrics, Inc., general partner; and Schupak, Weltman, Eric Rosenfeld, Ozzie Silna and Daniel Silna, limited partners. An amendment to the partnership agreement was filed on April 15, 1975 which named the following partners: Pak Fabrics, general partner; Franklin Sands, Max Grossman, Valerie Simpson, Nate Goodwin, Seymour Morris, Donald Calaman, Twin Oaks Associates, Richard Larner and Bruce Grassfield as Class I Limited Partners; and Ozzie Silna, Daniel Silna, Donald Schupak, Stanley Fleischer and Barry Florescue as Class II Limited Partners. Weltman was not named as a limited partner in the amendment. He did, however, sign the amendment in the capacity as President of Pak, Fabrics, Inc., the general partner, and as attorney-in-fact for the limited partners.

Weltman claims that the amendment was an invalid attempt to nullify his partnership interest in the profits generated by the Spirits. He claims that defendants have wrongfully withheld a percentage of the profits which are due him under the original partnership agreement. Defendants counter that the amendment effectively caused the termination of Weltman's partnership interest, and that under the terms of the amendment, Weltman is not entitled to any of the profits generated. The issue,

therefore, centers directly on the validity of the amendment.

FINDINGS OF FACT

1) This is a suit between parties of diverse citizenship with the amount in controversy exceeding ten thousand dollars. The Court has jurisdiction over the complaint.

2) Weltman at the time this action was commenced was a citizen of the State of Ohio.

3) Ozzie Silna at the time this action was commenced was a citizen of the State of New Jersey.

4) Daniel Silna at the time this action was commenced was a citizen of the State of New Jersey.

5) Schupak at the time this action was commenced was a citizen of the State of Nevada.

6) Pak Fabrics is a corporation organized and existing under the laws of the State of New Jersey. It is an inactive corporation with no principal place of business.

7) The Spirits is a Delaware limited partnership.

8) Venue is proper in the Eastern Division of the Eastern Jusicial [sic] District of Missouri.

9) On October 14, 1974, Pak Fabrics, Weltman, Schupak and the Silnas entered into a limited partnership agreement wherein Pak Fabrics was named as general partner, and Weltman, Schupak and the Silnas were named as limited partners. The subject of this agreement was ownership of the Spirits.

10) Weltman was named as President and General Manager of the Spirits.

11) On April 15, 1975, an Amendment to the partnership agreement was filed with the Secretary of State of the State of Delaware. Weltman was not named as a limited partner in the amendment. He signed it as President of Pak Fabrics, Inc., the general partner, and as attorney-in-fact on behalf of Pak Fabrics, Inc. for all of the limited partners.

12) The limited partners named in the amendment each signed a power-of-attorney, giving Schupak the power-of-attorney in matters connected with the Spirits' partnership interests.

13) After the Spirits' second season in St. Louis, the ABA went out of existence. The Spirits assigned and/or sold their player contracts to teams participating in the National Basketball Association (hereinafter NBA). A portion of the NBA's national television revenue is payable in perpetuity to the Spirits.

14) Weltman has demanded of defendants a share of the television payments, or an accounting, but defendants have refused payment.

CONCLUSIONS OF LAW

The partnership agreement is governed by the law of the State of Delaware. The issue in dispute concerns the validity of an amendment to the partnership agreement. The applicable state law is found in Del. Code Ann. Title

6, §§17-101 through 1108 (Supp. 1986).[1] Weltman claims that the Amendment is invalid because he did not sign it in his capacity as a limited partner. He further argues that the amendment is ineffective as an assignment of his interest because he did not sign it in the capacity of an assignor. Defendants argue that the amendment is valid because Weltman signed it in the capacity of a general partner and as attorney-in-fact for the new limited partners. Defendants further argue that Weltman's signature as an assignor was unnecessary because the amendment did not purport to assign his interest. Based on the live and deposition testimony and the exhibits produced by all the parties, the Court finds that the amendment purported to effectuate the withdrawal of Weltman as a limited partner and the admission of additional partners to the existing partnership. The following statutory provisions are pertinent to the issue concerning the validity of the amendment:

> "§ *17-201. Certificate of limited partnership.*
>
> "(a) In order to form a limited partnership 1 or more persons (but not less than all of the general partners) must execute a certificate of limited partnership. The certificate of limited partnership shall be filed in the Office of the Secretary of State and set forth:

---

[1] These sections amended prior statutory provisions pertaining to limited partnerships which were in effect at the time the Spirits' partnership was formed. The new sections became effective on August 1, 1985, and apply retroactively to those limited partnerships formed on or after July, 1973. The Spirits' partnership was formed in 1974. Therefore, the newer sections will be applied herein.

"(1) The name of the limited partnership;

"(2) The address of the registered office and the name and address of the registered agent for service of process required to be maintained by §17-104 of this title;

"(3) The name and the business, residence or mailing address of each general partner; and

"(4) Any other matters the partners determine to include therein.

"(b) A limited partnership is formed at the time of the filing of the initial certificate of limited partnership in the Office of the Secretary of State or at any later date or time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.

"(c) The filing of the certificate of limited partnership in the Office of the Secretary of State shall make it unnecessary to file any other documents under Chapter 31 of this title. (6 Del. C. 1953, §1702; 59 Del. Laws, c. 105, §1; 59 Del. Laws, c. 422, §4; 63 Del. Laws, c. 420, §1; 65 Del. Laws, c. 188, §1.)"

"§17-202. *Amendment to certificate.*

"(a) A certificate of limited partnership is amended by filing a certificate of amendment thereto in the Office of the Secretary of State. The certificate of shall set forth:

"(1) The name of the limited partnership; and

"(2) The amendment to the certificate.

"(b) A general partner who becomes aware that any statement in a certificate of limited partnership was false when made, or that any matter described has changed making the certificate false in any material respect, shall promptly amend the certificate.

"(c) Notwithstanding the requirements of subsection (b) of this section, no later than 90 days after the happening of any of the following events an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be filed by a general partner:

"(1) The admission of a new general partner;

"(2) The withdrawal of a general partner; or

"(3) A change in the name of the limited partnership, or, except as provided in §17-104(b) and (c) of this title, a change in the address of the registered office or a change in the name or address of the registered agent of the limited partnership.

"(d) A certificate of limited partnership may be amended at any time for any other proper purpose the general partners may determined.

"(e) Unless otherwise provided in this chapter or in the certificate of amendment, a certificate of amendment shall be effective at the time of its filing with the Secretary of State. (6 Del. C. 1953, §§1724, 1725; 59 Del. Laws, c. 105, §1; 59 Del. Laws, c. 442, §1; 63 Del. Laws, c. 420, §1; 65 Del. Laws, c. 188, §1.)"

§17-204. *Execution.*

"(a) Each certificate required by this subchapter to be filed in the Office of the Secretary of State shall be executed in the following manner:

"(1) An initial certificate of limited partnership must be signed by all general partners;

"(2) A certificate of amendment must be signed by at least 1 general partner and by each other general partner designated in the certificate of amendment as a new general partner; and

"(3) A certificate of cancellation must be signed by all general partners or, if there is no general partner, by a majority of the limited partners.

"(b) Any person may sign any certificate or partnership agreement or amendment thereof by an attorney-in-fact. Powers of attorney relating to the signing of a certificate or partnership agreement or amendment thereof by an attorney-in-fact need not be sworn to, verified or acknowledged, and need not be filed in the Office of the Secretary of State, but must be retained by a general partner.

"(c) The execution of a certificate by a general partner constitutes an oath or affirmation, under the penalties of perjury in the third degre [sic], that, to the best of the general partner's knowledge and belief, the facts stated therein are true."

§17-301. *Admission of additional limited partners.*

"After the formation of a limited partnership, a person may be admitted as an additional limited partner:

"(1) In the case of a person acquiring a partnership agreement or, if the partnership agreement does not so provide, upon the consent of all partners; and

"(2) In the case of an assignee of a partnership interest, as provided in §17-704(a) of this title. (6 Del. C. 1953, §1708; 59 Del. Laws, c. 105, §1; 63 Del. Laws, c. 420, §1; 65 Del. Laws, c. 188, §1.)'

§17-603. *Withdrawal of limited partner.*

"A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in the partnership agreement and in accordance with the partnership agreement. If the partnership agreement does not specify the time or the events upon the happening of which a limited partner may withdraw or a definite time for the dissolution and winding up of the limited partnership, a limited partner may withdraw upon not less than 6 months' prior written notice to each general partner at his address as set forth in the certificate of limited partnership filed in the Office of the Secretary of State. (6 Del. C. 1953, §1716; 59 Del. Laws, c. 105, §1; 63 Del. Laws, c. 420, §1; 65 Del. Laws, c. 188, §1.)"

The partnership agreement contains the following pertinent provision: "(K) The right of the Partners to admit additional limited partners is confined to those persons who may become assignees or successors-in-

interest of a Limited Partner or those persons who have obtained the prior written consent of the General Partner." [Exhibit 1, p. 5].

The validity of the amendment depends on whether it was properly executed, so it is necessary for the Court to determine just which individuals were required to have signed the amendment and in what capacities. §17-204 says that a certificate of amendment must be signed by at least one general partner and by each other general partner designated in the certificate of amendment as a general partner. The amendment herein purports to name additional limited, not general, partners. It is, therefore, assumed that their signatures are not required since the statute does not specify the need. Weltman signed the amendment as president of Pak Fabrics, general partner. The amendment was properly executed under the requirement of §17-204.

The next question concerns the purpose of the amendment. The amendment purported to add additional limited partners. §17-301 says that additional limited partners may be admitted to a limited partnership after its formation by either complying with terms set out in the partnership agreement, or, absent stated terms, upon consent of all partners. Weltman's signature in his capacity as a limited partner does not appear anywhere in the record. §17-301 refers to compliance with terms set out in the partnership agreement. The partnership agreement specifically approves of the admission of additional limited partners who obtain prior written consent of the general partner. Weltman signed the amendment as president of Pak Fabrics, general partner, thereby expressing

the required consent. The amendment is valid in admitting additional partners.

The statute does not require the signature of a withdrawing limited partner beyond what might be contained in the partnership agreement. The partnership agreement herein is silent. The Court finds Weltman's signature in his capacity as a limited partner is not necessary in order to recognize the validity of the amendment.

Accordingly, the Court finds that judgment will be granted in favor of the defendants. The Clerk of the Court will prepare and enter the proper judgment in accordance with the findings of this Court.

/s/ Roy W. Harper
U. S. District Judge

September 21, 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN, Plaintiff, VS OZZIE SILNA, DANIEL SILNA, DONALD SCHUPAK, SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P., and PAK FABRICS, INC., d/b/a PAK FABRIC SALE COMPANY, Defendants.	)	No. 87-0091C(A)

JUDGMENT
(Filed Sep. 21, 1988)

This action came on for trial before the Court and the Honorable Roy W. Harper, District Judge, presiding, and the issues having been duly tried and in accordance with the Memorandum Opinion this day filed which is incorporated in and made a part of this judgment:

IT IS HEREBY ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the defendants Ozzie Silna, Daniel Silna, Donald Schupak, Spirits of St. Louis Basketbell Club, L.P., and Pak Fabrics, Inc., d/b/a Pak Fabrics, Inc., d/b/a Pak Fabric Sale Company.

EYVON MENDENHALL, Clerk

/s/ Carrie Murphy
Deputy Clerk

Dated at St. Louis, MO
this 21st day of September, 1988

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN, Plaintiff,	)	
v.	)	
OZZIE SILNA, et al,	)	NO. 87-91C-A
Defendants.	)	

NOTICE OF APPEAL

(Filed Sep. 28, 1988)

Comes now Harry Weltman, plaintiff herein, and files his Notice of Appeal from the Judgment and Memorandum Opinion incorporated therein under date of September 21, 1988.

ANDERSON, GILBERT & GARVIN

by: /s/ Leo V. Garvin, Jr.
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(314) 721-2777

Attorneys for Plaintiff-Appellant

Harry WELTMAN, Appellant,

v.

Ozzie SILNA, Daniel Silna, Donald Schupak, Spirits of St. Louis Basketball Club, L.P., and Pak Fabrics, Inc., d/b/a Pak Fabric Sale Co., Appellees.

No. 88-2500.

United States Court of Appeals,
Eighth Circuit.

Submitted April 13, 1989.

Decided July 19, 1989.

Leo V. Garvin, Jr., St. Louis, Mo., for appellant.

Thoams M. Newmark, St. Louis, Mo., for appellees.

Before ARNOLD, Circuit Judge, BRIGHT, Senior Circuit Judge and MAGILL, Circuit Judge.

BRIGHT, Senior Circuit Judge.

Appellant Harry Weltman appeals from a judgment entered after a bench trial rejecting his claim to a limited partner's share of the proceeds received by a former American Basketball Association (ABA) team pursuant to a 1976 merger agreement between the ABA and the National Basketball Association (NBA). We reverse and remand to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

In 1973, appellee attorney Donald Schupak asked Weltman to locate a sports franchise for Schupak and two

of his clients, appellees Ozzie and Daniel Silna, to purchase. Weltman found an available American Basketball Association franchise, which the group purchased and moved to St. Louis, renaming the club the Spirits of St. Louis. In 1974, the investors purchased the franchise through a limited partnership, appellee Spirits of St. Louis Basketball Club, L.P. (Spirits), formed under Delaware law. Pak Fabrics, Inc., a New Jersey corporation, acted as the general partner. Schupak, Weltman, the Silnas and Eric Rosenfeld comprised the limited partners. Weltman received a five percent interest in the partnership and severed as president of the general partner corporation. Weltman managed the club's business operations in St. Louis while the other partners remained absentee owners.

In an attempt to raise further capital for the financially troubled club, the group filed an amendment to the partnership agreement with the Delaware Secretary of State on April 15, 1975. This amendment named several new limited partners, but did not list Weltman as a limited partner. Weltman signed the amendment in December of 1974 in his capacities as president of Pak Fabrics and attorney-in-fact for the limited partners.[1]

As part of the settlement of a lawsuit between the ABA and the rival NBA, the Spirits ceased operations in July 1976. Under the settlement, the team sold its player contracts to new NBA expansion clubs in exchange for present and deferred cash payments and for a share of

---

[1] Appellant asserts that Weltman possessed no written powers of attorney from the limited partners.

future television revenue in perpetuity. The payments for the 1987-1988 basketball season amounted to approximately $1,350,000. Weltman, who never received payments under the settlement, filed this suit to recover his limited partner's share of the proceeds.

The district court applied Del. Code Ann. tit. 6, §§ 17-1101 through 17-1108 (Supp. 1986), the amended Delaware partnership law, and held that Weltman withdrew from the partnership by signing, in his capacity as president of the general partner corporation, a 1975 amendment to the partnership agreement that added new partners but deleted Weltman's name.

Weltman appeals.

II. DISCUSSION

A. Jurisdiction

1. Diversity of Citizenship

Weltman brought this suit in the Circuit Court for the City of St. Louis alleging that his status as a limited partner in the Spirits of St. Louis Basketball Club entitled him to a share of the payments due under the settlement with the NBA. The appellees removed the action to the United States District Court for the Eastern District of Missouri, based on diversity of citizenship. At the time he commenced this suit, Weltman was a citizen of Ohio. Ozzie and Daniel Silna were citizens of New Jersey and Schupak was a citizen of Nevada. The Spirits of St. Louis Basketball Club was a Delaware limited partnership, and Pak Fabrics was an inactive New Jersey corporation with no principal place of business.

In determining diversity of citizenship, the citizenship of each limited partner must be considered. *The Stouffer Corp. v. Breckenridge*, 859 F.2d 75, 76 (8th Cir. 1988). Weltman contends that as a limited partner of the Spirits, his citizenship, too, must be considered in determining diversity. In essence, he is urging the court to treat him as both a plaintiff and a defendant for purposes of determining diversity. We decline to do so.

In *Gore v. Stenson*, 616 F.Supp. 895 (D.C.Tex.1984), the sole limited partner of a limited partnership brought suit against the limited partnership and its general partner in state court. The defendants removed the suit to federal court, basing jurisdiction on diversity of citizenship. The limited partner claimed that diversity was lacking because her citizenship as a limited partner must be considered in determining the citizenship of the limited partnership. The district court noted, *id.* at 900, that "plaintiff cannot assert her own Texas citizenship as the sole limited partner, thereby aligning herself as a defendant and destroying diversity. In this light, her claim becomes one against the sole general partner, whose domicile is Georgia."

We agree with the Texas court's analysis. The ultimate issue in the case is whether Weltman, who is not listed as a limited partner on the amended agreement, is in fact a limited partner. Essentially, Weltman is suing the general partner and the other limited partners claiming that he too is a limited partner and entitled to a share of the settlement proceeds. In this light, diversity plainly exists.

2. Waiver of Right to Remove

Weltman also argues that the appellees waived their right to remove the suit to federal court when they consented to subject matter jurisdiction and venue in the state court in the City of St. Louis. The agreement in which the appellees consented to Weltman's filing this suit in state court did not address removal. Waiver of the right to remove must be "clear and unequivocal," 1A J. Moore, B. Ringle & J. Wicker, *Moore's Federal Practice* ¶ 0.157[9] (2d ed. 1987), and thus the district court properly rejected Weltman's claims that the appellees waived their right to remove.

B. Merits

1. Applicable Law

The district court applied Delaware partnership law, as amended in 1982, in ruling on Weltman's claim. The amended statute carries an effective date of January 1, 1983, and its provisions are made applicable to partnerships formed after July 1973. Del.Code Ann. tit. 6, § 17-1104 (Supp. 1988). The investors formed the Spirits of St. Louis on October 14, 1974, and filed the amendment purporting to remove Weltman as a limited partner in April 1975. The district court reasoned that the amended statute applied the facts of this case because this partnership had been formed in 1974 and it interpreted § 17-1104 to require the amended statute to apply to limited partnerships formed after July 1973.

We disagree.

Under the amended statute, only the general partner's signature is necessary to execute an amendment to the partnership agreement. Del.Code Ann. tit. 6, § 17-204 (Supp. 1988). The earlier statutory scheme, in effect in 1974 and 1975 when the Spirits formed the partnership and attempted to amend the partnership agreement, required that a

> writing to amend a certificate [of partnership] shall be signed and sworn by all members, and an amendment substituting a limited partner or adding a limited partner or a general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

Del.Code Ann. tit. 6, § 1725 (repealed 1982). Under the amended statute, Weltman's signature as president of the sole general partner, Pak Fabrics, Inc., served to effectuate the amendment deleting Weltman's name as a limited partner. However, under the prior law, the attempted amendment could have been ineffective because the general partner's signature alone is insufficient to execute an amendment. The district court's application of the amended partnership statute to the facts of this case thus essentially validates actions which when taken in 1974 and 1975 might be insufficient to amend the partnership agreement. The district court made no findings and reached no conclusion concerning the validity of the amendment under the earlier version of the partnership law of Delaware.

The statutory language, and the approach more consistent with promoting a policy of certainty in business

relationships, is to read § 17-1104 of the amended statute to apply only to acts performed after January 1, 1985, by limited partnerships formed after 1973.

Subsection (b) of § 17-1104 provides, with certain exceptions not here applicable, that

> all limited partnerships formed on or after July 1, 1973, and prior to the effective date, under Chapter 17 of this title as hereby repealed, shall continue to be governed by that chapter until January 1, 1985, the "extended effective date", at which time such limited partnerships shall be governed by this chapter.

As we read this provision, a limited partnership formed after 1973, and those formed at least up to January 1, 1983, are governed by the provisions of the repealed statute until January 1, 1985, but thereafter by the new statute. Thus, we reject appellees' contention in this case that a statute not in existence when the parties acted governs the legality of that action by reason of the bringing of a lawsuit after the passage of the effective date of the statute in question.

Such approach also conforms with the general rule that amendment of a statute does not affect prior operation of the statute or any action taken thereunder. Uniform Law Commissioners' Model Statutory Construction Act, § 25(a)(1), 14 U.L.A. 532 (1980). *See also* 73 Am.Jur.2d *Statutes* § 350 (1974) (amendment to statute operates prospectively where retroactive application would destroy a vested right); 4 N. Singer, *Statutes & Statutory Construction*, §§ 41.01-41.06 (4th ed. 1986); *B. v. B.*, 396 A.2d 169, 171 (Del.Super.Ct. 1978) (stating the general rule that the law does not favor giving retroactive effect to statutes

especially where vested rights are concerned). This approach allows the parties to a business transaction to act without the worry that their actions may, at some later date, have a different significance under the law.

2. *Withdrawal from the Partnership*

The parties dispute whether the partnership documents comply with the earlier version of the Delaware partnership law, previously cited. This issue will be addressed on remand, and, if necessary, the district court will address other issues relating to the efficacy of Weltman's withdrawal from the partnership, and his contention that any purported withdrawal from the partnership or relinquishment of partnership rights should be invalidated for lack of consideration or other reasons.[2]

III. CONCLUSION

Accordingly, we reverse and vacate the judgment of dismissal and remand the case to the district court for a redetermination of Weltman's withdrawal from the partnership, and, if appropriate, a determination of the full merits of the case. The district court, at its discretion, may permit the parties to present additional evidence in this case.

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[2] That issue is also for the district court on remand and it will make such findings as it deems proper for disposition of this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN,	)	
Plaintiff,	)	
v.	)	
OZZIE SIMNA, et al	)	NO. 87-0091-C-A
Defendants.	)	

STIPULATION

Come now the parties, by and through their attorneys, and jointly represent to the Court that no further evidence shall be presented, and stipulate and agree that the Court may therefore rule on the merits of the cause on the basis of the record from the trial held on March 21, 1988.

ANDERSON, GILBERT &
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN, Plaintiff, vs. OZZIE SILNA, DANIEL SILNA, DONALD SCHUPAK, SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P., and PAK FABRICS, INC., d/b/a PAK FABRIC SALE COMPANY, Defendants.	)	No. 87-0091C (A) (Filed May 24, 1990)

MEMORANDUM OPINION

This case concerns a dispute arising out of a limited partnership agreement. Plaintiff, Harry Weltman (hereinafter Weltman), filed suit for damages resulting from an alleged breach of a limited partnership agreement and an accounting of the funds owing under the agreement. The documents in question are comprised of a Certificate of Limited Partnership of Spirits of St. Louis Basketball Club, L.P., dated October 14, 1974 (hereinafter the partnership agreement); and a Certificate of Amendment filed with the Secretary of State of the State of Delaware on April 15, 1975 (hereinafter the amendment). The facts giving rise to this dispute are as follows:

In 1973, Weltman was contacted by defendant, Donald Schupak (hereinafter Schupak). Schupak asked Weltman to locate a sports franchise for Schupak and two of his clients. Weltman was successful in finding an

American Basketball Association (hereinafter ABA) franchise available for purchase. This franchise was acquired by a limited partnership, and was moved to St. Louis, Missouri, where it became the St. Louis Spirits Basketball Club (hereinafter Spirits) during the 1974-75 and 1975-76 ABA seasons. The limited partnership was evidenced by the partnership agreement which named the following partners: Pak Fabrics, Inc., general partner; and Schupak, Weltman, Eric Rosenfeld, Ozzie Silna and Daniel Silna, limited partners. An amendment to the partnership agreement was filed on April 15, 1975 which named the following partners: Pak Fabrics, Inc., general partner; Franklin Sands, Max Grossman, Valerie Simpson, Nate Goodwin, Seymour Morris, Donald Calaman, Twin Oaks Associates, Richard Larner and Bruce Grassfield as Class I Limited Partners; and Ozzie Silna, Daniel Silna, Donald Schupak, Stanley Fleischer and Barry Florescue as Class II Limited Partners. Weltman was not named as a limited partner by the amendment. He did, however, sign the amendment in the capacity as President of Pak Fabrics, Inc., the general partner, and as attorney-in-fact for the limited partners.

Weltman claims that the amendment was an invalid attempt to nullify his partnership interest in the profits generated by the Spirits. He claims that defendants have wrongfully withheld a percentage of the profits which are due him under the original partnership agreement. Defendants counter that the amendment effectively caused the termination of Weltman's partnership interest, and that under the terms of the amendment, Weltman is not entitled to any of the profits generated. The issue,

therefore, centers directly on the validity of the amendment.

FINDINGS OF FACT

1) This is a suit between parties of diverse citizenship with the amount in controversy exceeding ten thousand dollars.[1] The Court has jurisdiction over the complaint.

2) Weltman at the time this action was commenced was a citizen of the State of Ohio.

3) Ozzie Silna at the time this action was commenced was a citizen of the State of New Jersey.

4) Daniel Silna at the time this action was commenced was a citizen of the State of New Jersey.

5) Schupak at the time this action was commenced was a citizen of the State of Nevada.

6) Pak Fabrics, Inc. is a corporation organized and existing under the laws of the State of New Jersey. It is an inactive corporation with no principal place of business.

7) The Spirits is a Delaware limited partnership.

8) Venue is proper in the Eastern Division of the Eastern Judicial District of Missouri.

9) On October 14, 1974, Pak Fabrics, Inc., Weltman, Schupak and the Silnas entered into a limited partnership

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[1] Case filed on January 15, 1987, by removal, prior to the revision of 28 U.S.C. §1332(a), where the amount in controversy was raised to $50,000 effective May 19, 1989.

agreement wherein Pak Fabrics was named as general partner, and Weltman, Schupak and the Silnas were named as limited partners. The subject of this agreement was the ownership of the Spirits.

10) Weltman purportedly contributed $500.00 for his interest in the limited partnership, yet was unable to establish when, where or how such contribution was completed or whether such contribution was actually made.

11) Weltman was named as President and General Manager of the Spirits.

12) On April 15, 1975, an Amendment to the partnership agreement was filed with the Secretary of State for the State of Delaware. Weltman was not named as a limited partner in the amendment. Weltman, however, signed the amendment as President of Pak Fabrics, Inc., the general partner, and as attorney-in-fact on behalf of Pak Fabrics, Inc. for all of the limited partners, then existing.

13) The limited partners named in the amendment each signed a power-of-attorney, giving Schupak the power-of-attorney in matters connected with the Spirits' partnership interests.

14) After the Spirits' second season in St. Louis, the ABA went out of existence. The Spirits assigned and/or sold their player contracts to teams participating in the National Basketball Association (hereinafter NBA). A portion of the NBA's national television revenue is payable in perpetuity to the Spirits, pursuant to a settlement

arranged by the Spirits and other owners of former ABA teams.

15) Weltman had demanded of defendants a share of the television payments paid or to be paid to the partnership pursuant to the settlement, or an accounting of such payments, but defendants have refused payment or accounting.

16) The cause was tried before the court in March 21, 1988.

17) On September 21, 1988, the Court entered its opinion finding that under the Delaware Limited Partnership Act, as amended in 1986, Weltman withdrew from the partnership and judgment was entered in favor of defendants.

18) Weltman subsequently appealed the decision and the Eighth Circuit Court of Appeals reversed and remanded the action to this court holding that the law applicable to the cause of action was the Delaware Limited Partnership Act as it existed prior to the 1986 amendment.

19) On January 2, 1990, the parties stipulated that the cause of action was to be submitted to the court upon the prior trial record with no additional evidence presented.

CONCLUSIONS OF LAW

The partnership agreement is governed by the law of the State of Delaware. The issue in dispute concerns the validity of an amendment to the partnership agreement. The applicable state law is found in Del. Code title 6,

§§1701, et seq..[2] Weltman claims that the amendment is invalid because he did not sign it in his capacity as a limited partner as required under Delaware law. Weltman further argues that the amendment is ineffective as an assignment of his interest because he did not sign it in the capacity of an assignor. Defendants argue that the amendment is valid because Weltman signed it in the capacity of a general partner and as an attorney-in-fact for the new limited partners. Defendants further argue that plaintiff's signature as an assignor was unnecessary because the amendment did not purport to assign his interest. Based on the live and deposition testimony and the exhibits produced by all the parties, the Court finds that the amendment purported to effectuate the withdrawal of Weltman as a limited partner and the admission of additional limited partners to the existing partnership. The following statutory provisions are pertinent to the issue concerning the validity of the amendment:

> **§ 1702. Formation**
>
> (a) Two or more persons desiring to form a limited partnership shall:
>
> (1) Sign and swear to a certificate which shall state:
>
> a. The name of the partnership;
>
> b. The character of the business;

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[2] 6 Del. C. 1953, §§ 1701, et seq. is utilized at the direction of the Eighth Circuit pursuant to their remand of the instant action.

c. the address . . . of the partnership's registered office in this State . . .

d. The name and place of each member; general and limited partners being respectively registered;

e. The term for which the partnership is to exist;

f. The amount of cash . . . contributed by each limited partner;

. . .

j. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution;

k. The right, if given, of the partners to admit additional limited partners;. . . . (6 Del. C. 1953, § 1702; 59 Del. Laws, c. 105, §1.).

§ 1708. Admission of additional limited partners.

After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with § 1725 of this title. (6 Del. C., 1953, § 1708; 59 Del. Laws, c. 105, §1.).

§ 1710. Rights of a limited partner.

. . . (b) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in

§§ 1715 and 1716 of this title. (6 Del. C., 1953, § 1710; 59 Del. Laws, c. 105, §1.).

§ 1715. Compensation of limited partner.

A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership of that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. (6 De. C. 1953, § 1715; 59 Del. Laws, c. 105, § 1.).

§ 1716. Withdrawal or reduction of limited partner's contribution.

. . . (c) In the absence of any statement in the certificate to the contrary to the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution. . . . (6 Del. C. 1953, § 1716; 59 Del. Laws, c. 105, § 1.).

§ 1724. When certificate shall be cancelled or amended.

. . . (b) A certificate shall be amended when:

. . . (3) An additional limited partner is admitted; . . .

(10) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them. (6 Del. C. 1953, § 1724; 59 Del. Laws, c. 105, § 1.).

§ 1725. Requirements for amendment and for cancellation of certificate.

(a) The writing to amend a certificate shall:

(1) Conform to the requirements of § 1792, subsection (a)(1) of this title as for as necessary to set forth clearly the change in the certificate which it is desired to make; and

(2) Be signed and sworn by all members, and an amendment substituting a limited partner to adding a limited or general partner shall be signed also by the member substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner. . . . (6 Del. C. 1953, § 1725; 59 Del. Laws, c. 105, § 1.).

§ 1730. Rules for cases not provided for in this chapter.

In any case not provided for in this chapter the agreement between the partners and the rule of law and equity, including the law merchant, shall govern. (6 Del. C. 1953, § 1730; 59 Del. Laws, c. 105, § 1.).

The limited partnership agreement in the instant case, to be effective, must comply with Delaware Limited Partnership Act (hereinafter referred to as the Act), 6 Del. C. 1953, §§ 1701, et seq.. The Act's provisions are intended to govern the determination of essentially all questions arising out of the formation and operation of limited partnerships formed after 1973. When, however, the limited partnership agreement and Act are silent as to a particular obligation or right held by a limited partner, the statute must be construed so as to flesh out the parties agreement consistent with promoting the policy of the Act, that of creating and maintaining certainty in business relationships.

The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention or purpose of the legislature, as expressed in the statute. *Balma v. Tidewater Oil Co.*, 214 A.2d 560, 562 (Del. Super. Ct. 1965). In statutory construction, there is a presumption against any unreasonable or impracticable execution or performance of the statute. *E.I. Du Pont De Nemours & Co. v. Clark*, 88 A.2d 436, 438 (Del. 1952). Further it is presumed that the legislature used the words in the statute in their ordinary and common meaning. *Bentley v. Interior Milling Co.*, 93 A.2d 121, 122, 123 (Del. 1952); *E.I. Du Pont De Nemours & Co. v. Clark*, 88 A.2d at 438.

The instant action involves the validity of the limited partnership amendment where an existing limited partner is not included in the amended version of the limited partnership membership composition. Neither the Act nor the original limited partnership agreement address the current issue. Consequently, Section 1730 of the Act

and the general presumptions and rules concerning statutory construction direct the Court to construe the Act for the resolution of the issue.

In order for the limited partnership amendment to be valid and operative, all the conditions of § 1702(a)(2) must be met which requires that a certificate documenting the partnership's membership composition, purpose, address, member contributions and members rights be signed and sworn to by the persons desiring to form or amend the limited partnership. Section 1702 requires compliance with the Act by all *members* of the limited partnership. This Court is of the opinion that the reasonable and proper definition of the term "member" in § 1702 includes existing limited partners evidenced by interests in the partnership and new limited partners to be added by amendment. It is further the opinion of this Court that the term "member" may not be reasonably construed to include former limited partners no longer maintaining an enforceable interest in the limited partnership. Further, the partnership agreement specifically approves of the admission of additional limited partners who obtain the written consent of the general partner.

Based on all the evidence, this Court is of the opinion that the limited partnership amendment is valid and operative since it conforms to the original certificate and the Act. Weltman signed the amendment as president of Pak Fabrics, Inc., general partner, which thereby was the general partner's expression of consent to approve the admission of additional limited partners through the amendment of the limited partnership certification. It is further the opinion of the Court that Weltman's signature in his capacity as a withdrawn limited partner was not

required for the efficacy of the amendment to the limited partnership agreement. This Court is convinced that Weltman withdrew from the limited partnership prior to the amendment. There was insubstantial evidence as to whether Weltman paid the $500 initial investment for his interest in the limited partnership and whether, therefore, he was to receive consideration for resigning his interest. Last, the evidence established that all existing limited partners and new limited partners signed and swore the amendment, in conformity with §§ 1702, 1724 and 1725.

Pursuant to § 1725(a)(2), a former limited partner is, however, required to sign the amendment only where such limited partner assigns his/her interest to another to be substituted in his/her place. 6 Del. C., 1953, § 1725(a)(2). Weltman would have been required to sign the amendment if he assigned his interest in the limited partnership to another limited partner, whether new or existing, to be substituted in his place. The Court is, however, of the opinion that there is insubstantial evidence to establish that Weltman assigned his limited partnership interest to one or more of the new or existing limited partners.

Since neither the Act nor the original partnership certificate require the signature of a withdrawing limited partner, the Court is of the opinion that Weltman's signature in his capacity as a limited partner was not a requirement under the original partnership certificate or the Act, for the purpose of validating the subsequent amendment. Further, the amendment to the limited partnership agreement is valid and operative as all requirements of the Act and original limited partnership agreement were complied with. Therefore, since Weltman was not included as

a limited partner in the amended limited partnership certificate, he is not entitled to judgment in the instant action.

Accordingly, the Court finds that judgment will be granted in favor of the defendants. The Clerk of the Court will prepare and enter the proper judgment in accordance with the findings of this Court.

/s/ Roy W. Harper
U.S. District Judge

May 24, 1990.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN, Plaintiff, vs OZZIE SILNA, DANIEL SILNA, DONALD SCHUPAK, SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P., and PAK FABRICS, INC., d/b/a PAK FABRIC SALE COMPANY, Defendants.	)	No. 87-0091C(A)

JUDGMENT

(Filed May 25, 1990)

Pursuant to the Mandate of the United States Court of Appeals for the Eigtht Circuit, reversing and remanding the previously entered Memorandum Opinion, this action was submitted on the prior trial record, and duly briefed and submitted to the Honorable Roy W. Harper, and in accordance with the Memorandum Opinion filed May 24, 1990 which is incorporated in and made a part of this judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of defendants Ozzie Silna, Daniel Silna, Donald Schupak, Spirits of St. Louis Basketball Club, L.P. and Pak Fabrics, Inc., d/b/a Pak Fabric Sale Company.

EYVON MENDENHALL, Clerk

by /s/ Carrie Murphy
Deputy Clerk

Dated at St. Louis, MO
this 25th day of May, 1990

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

HARRY WELTMAN, Plaintiff,	)	
vs.	)	No. 87-91 C (A)
OZZIE SILNA, et al, Defendants.	)	

NOTICE OF APPEAL

Comes now Harry Weltman, plaintiff herein, and files his Notice of Appeal from the Judgment and Memorandum Opinion incorporated therein under date of May 25, 1990.

ANDERSON, GILBERT & GARVIN

by: /s/ Leo V. Garvin, Jr.
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Harry WELTMAN, Appellant,

v.

Ozzie SILNA; Daniel Silna; Donald Schupak; Spirits of St. Louis Basketball Club, L.P.; and Pak Fabrics, Inc., d/b/a Pak Fabric Sale Co., Appellees.

No. 90-1940.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 9, 1991.

Decided June 11, 1991.

Leo V. Garvin, Jr., St. Louis, Mo., for appellant.

Thomas M. Newmark, St. Louis, Mo., for appellees.

Before ARNOLD, Circuit Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

BRIGHT, Senior Circuit Judge.

Harry Weltman appeals the district court's[1] judgment denying his claim to a limited partner's share of the proceeds received by the former American Basketball Association (ABA) team, the Spirits of St. Louis, pursuant to a 1976 merger agreement between the ABA and the National Basketball Association (NBA).[2] On appeal,

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[1] The Honorable Roy W. Harper, United States Senior District Judge for the Eastern and Western Districts of Missouri.

[2] The district court's decision is published as *Weltman v. Silna*, 739 F.Supp. 477 (E.D.Mo. 1990).

Weltman contends that the district court's finding that he had withdrawn from the partnership is not supported by sufficient evidence. We affirm.

I. BACKGROUND

Weltman participated in the purchase of an ABA franchise by a limited partnership, formed under Delaware law, which operated under the name Spirits of St. Louis Basketball Club, L.P. On October 14, 1974, the Spirits filed its original certificate of limited partnership, listing as general partner, Pak Fabrics, Inc., a New Jersey corporation of which Weltman served as president. The certificate listed Weltman and the individual appellees as the limited partners, with Weltman holding a five percent stake in the partnership.[3] Weltman served as president and general manager of the Spirits.

The Spirits did not thrive in St. Louis and thus faced immediate financial difficulties prompting the partnership to seek out additional investors in the fall of 1974. The Spirits' mounting financial problems caused Weltman some concern about his potential exposure to personal liability for the debts of the partnership. Weltman expressed this concern to attorney and limited partner Donald Schupak. Schupak later testified that he responded to Weltman's concerns by assuring Weltman his name would be removed from the ranks of the limited

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[3] The limited partnership certificate provided that in the event of the sale of the club, Weltman would receive five percent of the proceeds remaining after the principal investing limited partners had recouped their initial investments.

partners thus shielding him from any further potential liability, and that this change of status would be reflected in an amended certificate of limited partnership.

Schupak, in the meantime, had drafted and distributed a private placement memorandum as part of his campaign to attract additional investors to the club. After his discussion with Weltman, Schupak amended the memorandum to expressly state that Weltman had resigned as a limited partner. Schupak sent the amendments to the memorandum to Weltman by both telex and mail.

On December 31, 1974, the club executed an amended certificate of limited partnership adding to the list of limited partners a number of new investors. Consistent with Schupak's previous assurances, the amended certificate did not include Weltman's name in the list of limited partners. Weltman, acting in his capacity as president of the general partner corporation and attorney-in-fact for the limited partners, signed the amended certificate reflecting his withdrawal as a limited partner. The partnership filed the amended certificate with the Delaware Secretary of State on April 15, 1975.

As part of the settlement of a lawsuit which the ABA had filed against the NBA, the Spirits ceased operations in July 1976. Under the settlement, the Spirits sold its player contracts to new NBA expansion clubs in exchange for present and deferred cash payments as well as a share of the NBA's future television revenue in perpetuity.

Some years later, Weltman began to inquire into the distribution of the funds which the partnership continued

to receive as a result of the settlement with the NBA.[4] When the partnership rebuffed his inquiries, Weltman filed this suit claiming that he was entitled to a limited partner's share of the settlement proceeds and requesting an accounting. He specifically contended that under Delaware partnership law, the amended certificate reflecting his withdrawal as limited partner was invalid. He asserted that a withdrawing limited partner must sign the amended certificate effectuating his withdrawal in order for the amended certificate to have legal validity. Weltman thus contended that because the amended certificate was invalid, he remains a limited partner and is therefore entitled to a share of the NBA settlement proceeds.

The district court conducted a bench trial in March of 1988 and entered an opinion in September of that year concluding that under Delaware partnership law as amended in 1986, Weltman's signature in his capacity as limited partner was not necessary to effectuate his withdrawal from the limited partnership and render the amended certificate legally valid. On appeal, this court reversed and remanded with instructions to the district court to apply the pre-1986 Delaware partnership law in effect at the time of the execution of the original and

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[4] The actual date of Weltman's inquiries is not clear from the record. Weltman suggests that he inquired into the distribution of the settlement funds at the point in time when he estimated that the partnership had received sufficient funds from the settlement to have permitted the original principal investing limited partners to recoup their initial investments, as required under the terms of the original limited partnership certificate.

amended certificates. *Weltman v. Silna*, 879 F.2d 425 (8th Cir. 1989).

On remand, the parties submitted the case to the district court on the basis of the record developed in the earlier bench trial. The district court again concluded that the amended certificate was valid so far as it reflected Weltman's withdrawal as limited partner. It found that Weltman had withdrawn from the partnership prior to the amendment of the certificate and concluded that his signature in his capacity as a former limited partner was not necessary to give binding force to the subsequent amendment to the certificate reflecting his withdrawal. This appeal followed.

II. DISCUSSION

Weltman's principal assertion on appeal is that the amended certificate reflecting his withdrawal from the partnership is not valid because he did not sign it in his capacity as limited partner. The district court determined that the amended certificate did in fact comply with Delaware limited partnership law in effect at the time of the events in question. *See* Del.Code Ann. tit. 6, §§ 1701-1730 (1974) (repealed 1982). In the course of making this determination, however, the district court also found that Weltman had withdrawn from the partnership *prior* to the amendment of the certificate. We believe this finding is dispositive of the legal dispute between the parties.

Weltman's focus on the validity of the amendment to the certificate evidencing his withdrawal presupposes that the withdrawal of a limited partner under then-

existing Delaware limited partnership law was not effective until the certificate of limited partnership had been amended. However, the provisions of the Delaware limited partnership statute then in effect did not impose any conditions precedent to the effective withdrawal of a limited partner. Consequently, we agree with the district court's conclusion that Weltman did not need to sign the partnership's amended certificate as a condition precedent to effectuating his withdrawal.[5] *See* Del.Code Ann. tit. 6, § 1724 (1974) (repealed 1982); *cf. Nobel v. Morchesky*, 697 F.2d 97 (3d Cir. 1982) (under provisions of Pennsylvania Limited Partnership Act mirroring Delaware statute, retired general partner is not required to sign amended certificate of limited partnership in order to be considered retired). We therefore turn our attention to the district court's finding that Weltman had withdrawn prior to the amendment of the certificate, a finding which Weltman asserts is not supported by sufficient evidence.

We review the district court's finding of fact under the clearly erroneous standard Fed.R.Civ.P. 52(a); *see Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *LCA Corp. v. Shell Oil Co.*, 916 F.2d 434 (8th Cir. 1990). Thus, we reverse only if our review of the entire record leaves us with a "definite and firm conviction" that a mistake has been made. *Id.* 470 U.S. at 573, 105 S.Ct. at 1511. Having reviewed the

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[5] The statute required an amendment to the certificate upon the withdrawal of a *general* partner, Del.Code Ann. tit. 6, § 1724(b)(5) (1974) (repealed 1982), or when an individual is *substituted* as a limited partner, Del.Code Ann. tit. 6, § 1724(b)(2).

record in its entirety, we conclude that the district court's finding that Weltman withdrew prior to the amendment of the certificate is not clearly erroneous.

The record shows that Weltman was well aware of the club's financial difficulties. These difficulties led him to discuss his concerns about potential exposure to liability with attorney and limited partner Donald Schupak.[6] Schupak testified that he assured Weltman that his liability concerns would evaporate upon his removal from the limited partner ranks. Shortly after this conversation, and prior to the amendment of the limited partnership certificate, Schupak amended a private placement memorandum to prospective investors to state that Weltman had resigned as limited partner. Schupak further testified that he sent Weltman copies of the amended prospectus.

The record also contains additional evidence consistent with the district court's finding that Weltman had withdrawn from the partnership including, *inter alia*, Weltman's personal income tax returns in which he failed to declare any partnership interest, and the partnership's tax returns, which are similarly void of any reference to Weltman's purported continuing association with the Spirits. Weltman provided countering evidence in support of his claim; however, we cannot say that the district court's account of the evidence is implausible in light of

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[6] Although Weltman's limited partner status would ordinarily limit his potential liability to creditors, his role as president and general manager of the Spirits subjected him to potential general partner liability as one who "takes part in the control of the business." Del.Code Ann. tit. 6, § 1707.

the record viewed in its entirely. *See Anderson*, 470 U.S. at 573-74, 105 S.Ct. at 1511. At worst, the record supports two permissible views of the evidence regarding the issue of Weltman's prior withdrawal. "Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Id.* at 574, 105 S.Ct. at 1511. Consequently, we reject Weltman's contentions.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1040 EM

HARRY WELTMAN

Appellant,

vs.

OZZIE SILNA, DANIEL SILNA, DONALD SCHUPAK, SPIRITS OF ST. LOUIS BASKETBALL CLUB, L.P. AND PAK FABRICS, INC., d/b/a PAK FABRIC SALE CO.,

Appellees.

PETITION FOR REHEARING IN BANC

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PRELIMINARY STATEMENT

This is the second appeal of an action by appellant to recover a limited partner's share of proceeds from a sale of assets of the partnership. Appellant claims he is still a limited partner in the Spirits of St. Louis Basketball Club, L. P., a Delaware limited partnership, because a 1974 amendment (which did not list appellant as a limited partner) to the original certificate of limited partnership was invalid under Delaware law. The district court (the Honorable Roy W. Harper, Eastern District of Missouri) conducted a bench trial and found the 1974 amendment both operated to effect appellant's withdrawal, and was effective under Delaware law in effect *at the time of trial* in March of 1988.

A panel of this court reversed the district court's judgment and remanded the case for application of the Delaware law in effect at the time of the amendment. *Weltman v. Silna*, 879 F.2d 425 (8th Cir. 1989). On remand, the district court found, under the heading "Conclusions of Law", that appellant had withdrawn from the partnership *prior* to the amendment, and thus avoided determining the outcome of the case on the validity of the amendment, which appellant contended did not comply with the earlier Delaware law.

On this appeal, the panel's opinion states that the district court's "finding" that appellant had withdrawn from the partnership prior to the amendment is "dispositive" of the case, and the applicable standard of review is the "clearly erroneous" rule.

Appellant contends this standard of review is incorrect because the question of *whether* a limited partner

could simply "resign" under the then Delaware law is a pure question of law which is not subject to the "clearly erroneous" standard of review. The panel's opinion ignores this question, which is the threshold issue in, and is necessary for, a full and complete determination of the case. The two-part question whether a limited partner could simply resign, and if so, whether appellant did so in this case is *at least* a mixed question of law and fact, to which some prior decisions of this circuit have either not applied the "clearly erroneous" standard of review or suggested that it is less rigid in reviewing such mixed questions. *Wirtz v. Barnes Grocer Company*, 398 F.2d 719, 722 (8th Cir. 1968); *Rogers v. Bates*, 431 F.2d 16, 18 (8th Cir. 1970). See also, *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977).

PETITION FOR REHEARING IN BANC

Appellant respectfully requests the Court, pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure, to grant a rehearing and reconsideration of this appeal, in banc, for the following reasons set out in the *Argument*, below.

ARGUMENT

I.

THE COURT HAS MISAPPREHENDED AND MISAPPLIED A "CLEARLY ERRONEOUS" STANDARD OF APPELLATE REVIEW TO A PURE QUESTION OF LAW.

A. THE PROVISION OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE THAT FINDINGS OF FACT IN COURT-TRIED CASES SHALL NOT BE SET ASIDE UNLESS "CLEARLY ERRONEOUS" HAS NO APPLICATION TO QUESTIONS OF LAW.

In this case appellant claims a limited partner's share of proceeds from the sale of assets of a Delaware limited partnership. Appellees defended on the basis that appellant was no longer a limited partner because he had resigned or withdrawn from the partnership, and the original certificate of limited partnership had been "superseded" by an amendment dated December 31, 1974, and filed in the office of the Delaware Secretary of State in April of 1975. *See*, First Amended Answer of All Defendants, *App.* 24-31.

The first district court memorandum opinion stated that the issue in the case "centers directly on the validity of the amendment" to the original certificate of limited partnership which did not list appellant as a limited partner. *App.* 542. The district court found the amendment both operated to effect appellant's withdrawal from the partnership, and was valid under Delaware law in effect at the time of trial in March of 1988. *App.* 545-549. On appeal, a panel of this Court remanded the case back to the district court for application of the Delaware law in

effect at the time of the amendment. *Weltman v. Silna*, Supra.

The second district court memorandum opinion contained the following statement, in the "Conclusions of Law" section of the opinion:

> "This Court is convinced that Weltman withdrew from the limited partnership prior to the amendment."

Memorandum Opinion of May 24, 1990. *App. 574*. The district court thus avoided having to make a determination of the case on the basis of the validity of the 1974 amendment.

On this second appeal, the panel has affirmed the judgment of the district court and applied a "clearly erroneous" standard of appellate review to the district court's "finding" that appellant had withdrawn from the limited partnership prior to the 1974 amendment, in apparent reliance on Rule 52(a) of the Federal Rules of Civil Procedure. *See*, Slip. Op., at page 6.

The principle that findings of the trial court shall not be set aside unless "clearly erroneous" has no application when the questions are questions of law. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. General Electric Company*, 714 F.2d 830, 832 (8th Cir. 1983); *Ralston Purina Co. v. Hartford Accident and Indemnity Co.*, 540 F.2d 915 (8th Cir. 1976).

B. THE QUESTIONS WHETHER A LIMITED PARTNER COULD SIMPLY "RESIGN" FROM A LIMITED PARTNERSHIP, AND IF SO, WHETHER THE "RESIGNATION" NEEDED TO BE REFLECTED IN A WRITING ARE QUESTIONS OF LAW; THE EFFICACY OF THE PURPORTED AMENDMENT IN BRINGING ABOUT APPELLANT's WITHDRAWAL IS AT LEAST A MIXED QUESTION OF LAW AND FACT.

While the district court's denomination of an issue as one of fact or law is not binding on this court, the district court did indeed include the "finding" of appellant's withdrawal in the "Conclusions of Law" section of the memorandum opinion. Even if one characterizes the resignation or withdrawal as a "fact", however, the panel's standard of review is incorrect, because it overlooks the real *question of law* as to whether or not a limited partner *could* simply say "I resign" and alter his or her status as a limited partner under the Delaware law in effect in 1974-1975. If a limited partner could simply "resign", a second *question of law* ignored by the district court and the panel is whether the "resignation" needed to be reflected in a writing. Appellant shall not burden the court here with a reargument of the reasons *why* a limited partner could not simply "resign" under then Delaware law (because that is not the purpose of this petition), other than to note that a limited partnership interest is a strictly passive form of investment akin to owning stock in a corporation, and just as one doesn't say "I resign" from shareholder status, one couldn't say "I resign" as a limited partner. The procedures for transfer of a limited partner's interest provided under Delaware law had to be followed. The district court did specifically find that

there was "insubstantial" evidence of an *assignment* by appellant of his limited partnership interest. *App. 575.*

When these questions of law are considered, the act of resignation or withdrawal itself is transformed into at least a mixed question of law and fact. Prior decisions in this circuit have held that the appellate court may review the findings of the trial court free of the "clearly erroneous" standard. *Wirtz v. Barnes Grocer Company,* supra; *Brennan v. Plaza Shoe Store, Inc.*, 522 F.2d 843, 846 (8th Cir. 1975).

II.

CONSIDERATION BY THE FULL COURT IS NECESSARY TO SECURE UNIFORMITY TO THE DECISIONS OF THIS CIRCUIT.

While there have been decisions of this court which have held that the appellate court may review the findings of the trial court on mixed questions of law and fact free of the "clearly erroneous" standard, appellant must also point out that there have also been decisions in this circuit which hold the contrary. *Dunlap, by Wells vs. Buchanan* 741 F.2d 165 (8th Cir., 1984); *Rogers vs. Bates* 431 F.2d 16, 18 (8th Cir., 1970).

Having precedent on both sides of an issue may well give an appellate court some desired flexibility to reach a particular result in a particular case, but it causes confusion at the trial level and may well lead to inconsistent holdings on appeal, depending upon the particular panel or issue involved. Consideration by the full court is therefore necessary to secure uniformity to the decisions of this Circuit.

CONCLUSION

For the foregoing reasons, appellant respectfully prays the Court to grant appellant a rehearing and reconsideration of this appeal.

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STATEMENT OF COUNSEL

I express a belief, based upon a reasoned and studied professional judgment, that the decision of the panel is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court; *Brennan vs. Plaza Shoe Store, Inc.*, 522 F.2d 843 (8th Cir., 1975); *Wirtz vs. Barnes Grocer Company* 398 F.2d 718 (8th Cir., 1968).

I also express a belief, based upon a reasoned and studied professional judgment, that this appeal raises the following question of exceptional importance:

Whether the Court applied the proper standard of appellate review to the question of law as to the withdrawal of a limited partner from a Delaware limited partnership, under the Delaware limited partnership law in effect in 1974-1975. Dated this 25th day of June, 1991.

/s/ Leo V Garvin Jr
Leo V. Garvin, Jr.

Attorney of record for
Appellant Harry Weltman

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of appellant's petition for rehearing in banc were served upon appellees by hand delivery to:

David W. Harlan
Thomas M. Newmark
Cawood K. Bebout
Attorneys at Law
101 South Hanley, 14th Floor
St. Louis, Missouri 63105

by personal delivery to their office, this 25th day of June, 1991.

/s/ Robert W. Butler
Robert W. Butler

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-1940EM

Harry Weltman, Appellant, v. Ozzie Silna; Daniel Silna; Donald Schupak; Spirits of St. Louis Basketball Club, L.P.; and Pak Fabrics, Inc., d/b/a Pak Fabric Sale Co., Appellees.	* Order Denying * Petition for * Rehearing with * Suggestion for * Rehearing * En Banc * * * * *

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

The petition for rehearing is also ordered denied.

August 6, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.